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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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UNITED STATES OF AMERICA,)

) VOLUME 3

4

Plaintiff,)

) C.A. No. 21-1644 (MN)

5

v.)

)

6

UNITED STATES SUGAR)

CORPORATION, et al.,)

7

)

Defendants.)

8

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Wednesday, April 20, 2022

10

8:30 a.m.

Bench Trial

11

844 King Street

12

Wilmington, Delaware

13

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BEFORE: THE HONORABLE MARYELLEN NOREIKA

United States District Court Judge

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APPEARANCES:

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UNITED STATES ATTORNEY'S OFFICE

BY: SHAMOR ANIS, ESQ.

19

-and

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U.S. DEPARTMENT OF JUSTICE

21

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BY: CHINITA M. SINKLER, ESQ.

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BY: ROBERT LEPORE, ESQ.

BY: CURTIS STRONG, ESQ.

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08:18:54 1 THE COURT: Good morning. Please be seated.

08:31:22 2 Okay. We're going to start with some depositions?

08:31:25 3 MR. HANNA: Yes, Your Honor, the government is
08:31:27 4 going to play four depositions. I think it's a little over
08:31:31 5 an hour. The first one we can do in open court and then
08:31:37 6 there will be three in closed court. And then the
08:31:40 7 government plans to rest its case in chief at that point.

08:31:43 8 THE COURT: Okay.

08:31:44 9 MR. HANNA: At this time the United States calls
08:31:47 10 Pedro Figueroa, the vice-president of sales and marketing of
08:31:50 11 Michigan Sugar.

08:31:51 12 THE COURT: Okay. Thank you.

08:31:51 13 (Videotape deposition of Pedro Figuero:)

08:32:00 14 Q. So you joined Michigan Sugar in January 2018, is that
08:32:04 15 right?

08:32:04 16 A. Yes.

08:32:04 17 Q. And has your job description has been the same since
08:32:08 18 you joined Michigan, since you started at Michigan Sugar?

08:32:11 19 A. Yes, I have been vice-president of sales and
08:32:13 20 marketing since day one, yes.

08:32:15 21 Q. Can you give us a couple sentences on what your job
08:32:18 22 responsibility are and what you do on a daily basis?

08:32:21 23 A. So I'm responsible for the commercial direction and
08:32:24 24 strategy of our co-op. Michigan Sugar is a cooperative
08:32:25 25 owned by grower owners. So responsible for setting the

08:32:31 1 commercial direction, sales, marketing, and supply chain
08:32:36 2 responsibilities, covering around 1.3 billion pounds of
08:32:40 3 sugar that our co-op produces every year.

08:32:43 4 Q. Thank you. And you described Michigan Sugar as a
08:32:46 5 cooperative. Is that right?

08:32:47 6 A. Yes.

08:32:48 7 Q. Do you deliver to customers from that facility all
08:32:52 8 over the United States or customers in specific locations?

08:32:55 9 A. We are a regional sugar supplier. We're not coast to
08:33:00 10 coast. We're not national. So within a certain geography.

08:33:05 11 Q. So the only production location is in Toledo?

08:33:08 12 A. We have four factor -- four sugar beet factories in
08:33:12 13 Michigan. They take the beets and turn them into sugar.

08:33:15 14 We have the one location in Toledo that takes
08:33:18 15 our beet sugar and converts it into liquid sucrose. And
08:33:22 16 then we have three -- one location that takes our sugar and
08:33:26 17 converts it into powdered sugar which is in Carrolton,
08:33:30 18 Michigan.

08:33:33 19 And then we have two satellite bulk storage
08:33:37 20 facilities in Ohio; Findley, Ohio and Fremont, Ohio.

08:33:42 21 Q. And does your company have any facilities that are
08:33:46 22 outside of Ohio and Michigan?

08:33:49 23 A. No.

08:33:52 24 Q. Your production facilities, are they currently
08:33:56 25 operating at full capacity or something less than full

08:33:55 1 capacity?

08:33:55 2 A. In terms of the factories themselves?

08:33:58 3 Q. That's right. The processing --

08:34:01 4 A. Yeah. I guess it depends on how you define "full
08:34:06 5 capacity." But they are running as close to full capacity
08:34:09 6 as possible.

08:34:10 7 Q. Does Michigan Sugar have a regional focus?

08:34:14 8 A. Yes.

08:34:14 9 Q. Can you tell us what you mean by that?

08:34:16 10 A. Our geographical footprint extends to the western
08:34:21 11 most point, Chicago, the Chicago market. We cover all of
08:34:25 12 the Indiana market. Ohio, Michigan, parts of western New
08:34:30 13 York, parts of western Pennsylvania, and the fringes of
08:34:34 14 northern Kentucky.

08:34:37 15 Q. Why does the company have that regional focus?

08:34:43 16 A. It's a limitation on freight transportation costs to
08:34:48 17 get to our customers. So the farther we get away, the more
08:34:54 18 freight cost that we are encountering. So it has an effect
08:35:00 19 on our competitiveness overall.

08:35:02 20 Q. And what's the radius, can you give us a sense for
08:35:06 21 the radius that is in place at which it no longer makes
08:35:09 22 sense to try to compete?

08:35:12 23 A. We're probably looking at 450 miles, 500 miles.

08:35:16 24 Q. And beyond that radius, the freight costs add up to
08:35:19 25 make your company not competitive? Would that be fair to

08:35:23 1 say?

08:35:23 2 A. Correct.

08:35:24 3 Q. To what extent is the company selling sugar in the
08:35:27 4 southeast United States?

08:35:29 5 A. Okay. So based on today's numbers, around 3.8,
08:35:35 6 3.9 percent of our sales are actually -- will be considered
08:35:40 7 going to that particular area of the country.

08:35:43 8 Q. And when you say "particular area of the country," to
08:35:48 9 what are you referring? Can you list it by states, if you
08:35:51 10 can?

08:35:51 11 A. Yup. The only state -- well, two states: North
08:35:57 12 Carolina, and Kentucky.

08:36:01 13 Q. Okay. So 3.8 percent of your sales going to North
08:36:05 14 Carolina and Kentucky. Is that correct?

08:36:07 15 A. Yes. Today.

08:36:08 16 Q. As we sit here today?

08:36:10 17 A. Yes.

08:36:11 18 Q. So states like Alabama, Florida, Georgia, Tennessee,
08:36:15 19 Delaware, would it be fair to say that you have no sales in
08:36:18 20 those states?

08:36:20 21 A. That's correct.

08:36:21 22 Q. Why do you all sell in North Carolina? Why is this
08:36:25 23 situation different in North Carolina than, say, Georgia?

08:36:30 24 A. It's the geographical difference, compared to
08:36:34 25 Michigan to those states versus the other states that you've

08:36:39 1 mentioned. They're much farther south or much further to
08:36:43 2 the east.

08:36:43 3 Q. What are the outer bounds -- can you name the state
08:36:47 4 which represents the outer bounds at which your company
08:36:50 5 would be competitive selling sugar?

08:36:52 6 A. We're selling in North Carolina. There could be an
08:36:55 7 issue of other supply chain issues around the country. We
08:36:59 8 serve as a good alternative. But historically the outer
08:37:05 9 fringe of what we will service will be the northern Kentucky
08:37:10 10 market.

08:37:11 11 Q. Are you aware of any plans that the company has to
08:37:14 12 increase sales outside of the Midwest?

08:37:18 13 A. We have plans to grow in terms of the amount of sugar
08:37:21 14 that we produce. But that doesn't necessarily translate
08:37:30 15 into an expansion of our geographical coverage.

08:37:35 16 Q. Do you ever sell to distributors?

08:37:38 17 A. Yes.

08:37:39 18 Q. Under what circumstances does Michigan Sugar sell to
08:37:43 19 a distributor?

08:37:44 20 A. We have historical commercial relationships with some
08:37:47 21 of these distributors. And so just on the basis of
08:37:51 22 assigning a particular percentage of our overall production,
08:37:54 23 we will entertain doing business with some of these
08:37:57 24 historical distributors.

08:38:00 25 Q. Has Michigan Sugar ever lost a sale to a distributor,

08:38:09 1 that you're aware of?

08:38:10 2 A. I would say we compete with distributors, too. So we
08:38:14 3 sell to distributors, and there are times we actually
08:38:17 4 compete with them, against them.

08:38:19 5 Q. You compete with them. All right. And how often
08:38:22 6 does that happen?

08:38:23 7 A. Pretty often.

08:38:24 8 Q. It happens frequently?

08:38:26 9 A. Yes.

08:38:27 10 Q. I see. And so would it -- have you observed
08:38:30 11 situations in which for whatever reason it costs more money
08:38:34 12 to buy sugar in one geographic place than another in the
08:38:38 13 United States?

08:38:38 14 A. Yup. That certainly happens.

08:38:41 15 Q. I'm sorry. What was the answer?

08:38:44 16 A. That certainly happens.

08:38:46 17 Q. Okay.

08:38:47 18 A. Part of it has to do with the freight. The other
08:38:49 19 part has to do with whether that particular part of the
08:38:52 20 country wants to pay a premium for cane sugar, for example,
08:38:56 21 because it prefers cane to the next best alternative.

08:39:01 22 Q. When you see those price differentials, how long do
08:39:04 23 they last?

08:39:08 24 A. It's very hard to answer because the freight --
08:39:12 25 especially in today's world, the freight market is just

08:39:15 1 changing every day.

08:39:16 2 So those spreads and those differentials
08:39:19 3 contract and expand every single day. More so today than
08:39:24 4 they probably have contracted in years past when
08:39:27 5 transportation was a lot more consistent in terms of value.

08:39:31 6 Q. And do you consider United to be a competitor in --
08:39:35 7 nationally or in particular geographic locations?

08:39:38 8 A. In our particular geographical location because we're
08:39:43 9 not a national marketer. Michigan Sugar is not a national
08:39:47 10 marketer.

08:39:48 11 Q. What geographic locations does Michigan Sugar compete
08:39:53 12 with United in?

08:39:55 13 A. In our key geographic area, the same one I defined
08:40:00 14 earlier today: Chicago market, Indiana, some Michigan
08:40:05 15 accounts, Ohio, western PA, western New York.

08:40:09 16 Q. How often does Michigan Sugar compete head to head
08:40:13 17 with United?

08:40:15 18 A. All the time.

08:40:17 19 Q. It's frequent?

08:40:20 20 A. Yes.

08:40:22 21 Q. Does United have any competitive advantages over
08:40:25 22 Michigan Sugar?

08:40:27 23 A. United is a -- I guess their advantages come by way
08:40:32 24 of rail, rail transportation.

08:40:35 25 Q. I see. And to what extent does Michigan Sugar

08:40:40 1 compete with United in let's say North Carolina?

08:40:44 2 A. Very limited. Extremely limited.

08:40:48 3 Q. We talked a little bit about -- I think your answer
08:40:52 4 before was that your company doesn't sell sugar in Georgia.
08:40:56 5 Is that right?

08:40:57 6 A. Correct.

08:40:58 7 Q. Are you aware of any situations in which Michigan
08:41:01 8 Sugar has competed with United head to head in Georgia, for
08:41:08 9 example?

08:41:08 10 A. No.

08:41:08 11 Q. And is that because it's just a freight thing? You
08:41:12 12 guys aren't going to compete with anybody in Georgia?

08:41:15 13 A. It's not just a freight component. There's also
08:41:20 14 sugar availability. We don't have as much sugar to market
08:41:23 15 as United does.

08:41:24 16 Q. Why is that?

08:41:25 17 A. United Sugars is, as of today, 27 percent of the
08:41:31 18 market, we recon. So they are in essence four times larger
08:41:34 19 than Michigan Sugar is, so they have more sugar to sell.

08:41:42 20 Q. I want to show you one last document that, for our
08:41:42 21 benefit, was under Tab 1.

08:41:42 22 And I'm going to mark this as Exhibit 3. So
08:41:52 23 Ms. Parker, if you could put that in the chat.

08:42:00 24 Mr. Figueroa, I'm referencing, I'm drawing your
08:42:02 25 attention to Exhibit 3. You're able to access that right?

08:42:09 1 A. Yes.

08:42:09 2 Q. And do you recognize this as a questionnaire that was
08:42:13 3 propounded as part of the civil investigative demand?

08:42:16 4 A. Under the CID, yes.

08:42:18 5 Q. And did you help to prepare this?

08:42:20 6 A. Yes.

08:42:20 7 Q. And when you prepared it, was everything in there
08:42:23 8 accurate as far as you were able to tell?

08:42:25 9 A. Yes.

08:42:25 10 Q. If -- first of all, sugar beets are an agricultural
08:42:29 11 crop, right?

08:42:30 12 A. Yes.

08:42:30 13 Q. So the amount of sugar beets grown each year on a
08:42:33 14 particular acre is in large part controlled by Mother
08:42:37 15 Nature. Right?

08:42:37 16 A. Correct.

08:42:38 17 Q. Okay. So if the farmer owners of Michigan Sugar have
08:42:41 18 a large crop of sugar beets in a particular year, what
08:42:44 19 obligation does Michigan Sugar have to sell all the sugar
08:42:51 20 that is produced from those sugar beets?

08:42:52 21 A. We have a 100 percent obligation to produce as much
08:42:55 22 sugar as we can from those beets to bring to market, yes.

08:43:02 23 Q. Are all of your sugar beet processing facilities
08:43:05 24 located in Michigan?

08:43:07 25 A. Yes.

08:43:08 1 Q. And you talked earlier, you have the one facility in
08:43:12 2 Ohio where you create liquid sucrose from your sugar beets,
08:43:17 3 correct?

08:43:17 4 A. Correct.

08:43:18 5 Q. So all of Michigan Sugar's sales of sugar beet
08:43:27 6 products either originate in Michigan or Ohio; correct?

08:43:32 7 A. Yes.

08:43:33 8 Q. In your view, does Michigan Sugar have any production
08:43:36 9 limitations at your processing facilities?

08:43:39 10 A. No.

08:43:39 11 Q. And looking at the column entitled "events limiting
08:43:44 12 production utilization," does Michigan Sugar believe there
08:43:49 13 are external factors that limit your ability to produce more
08:43:53 14 sugar?

08:43:53 15 A. Yes.

08:43:54 16 Q. And can you explain what those are?

08:43:55 17 A. Yes. So it's the marketing allotment, the marketing
08:44:00 18 allocation that we are provided by USDA under the Farm Bill.

08:44:04 19 Q. And what is a marketing allotment?

08:44:08 20 A. Marketing allotment is basically a production
08:44:12 21 allocation that is assigned to Michigan Sugar under which we
08:44:15 22 are to produce and to market.

08:44:19 23 Anything above the allotment will be considered
08:44:24 24 an excess or over allotment and that sugar cannot be brought
08:44:30 25 to market. It will be blocked.

08:44:32 1 Q. So even if you produced that sugar and you had it
08:44:35 2 available to sell, you can't sell it? Is that right.

08:44:38 3 A. Correct.

08:44:39 4 Q. And who sets your marketing allotment?

08:44:42 5 A. The marketing allotment is set by the USDA as
08:44:46 6 determined by the Farm Bill and the sugar program.

08:44:49 7 Q. And who controls whether Michigan Sugar can increase
08:44:54 8 its marketing allotment over the course of a crop year?

08:44:59 9 A. The USDA.

08:45:00 10 Q. And is that something the USDA could do, if it wanted
08:45:05 11 to? Could it increase Michigan Sugar's marketing allotment
08:45:10 12 over a crop year?

08:45:11 13 A. It can. And it does.

08:45:13 14 Q. Okay. If the United States Department of Agriculture
08:45:16 15 were able to guarantee Michigan Sugar today that it was
08:45:21 16 going to have a permanently larger marketing allotment,
08:45:25 17 would Michigan Sugar produce more sugar to sell?

08:45:31 18 A. Yes.

08:45:31 19 Q. And where might Michigan Sugar sell that sugar?

08:45:32 20 A. Initially it would be within our geographical regions
08:45:36 21 with a potential to expand on the geographical area
08:45:40 22 coverage.

08:45:42 23 Q. We talked about the fact that Michigan Sugar
08:45:46 24 currently today sells into West Virginia and Kentucky.
08:45:50 25 Right? You looked at that on the document?

08:45:55 1 A. Uh-huh.

08:45:55 2 Q. With a bigger marketing allotment from USDA, would
08:46:00 3 Michigan Sugar sell perhaps further east into states like
08:46:03 4 Virginia and more into North Carolina?

08:46:07 5 A. Potentially, yes.

08:46:08 6 Q. With a bigger marketing allotment, would Michigan
08:46:12 7 Sugar sell more into the states like Tennessee?

08:46:15 8 A. Potentially, yes.

08:46:16 9 Q. With a bigger marketing allotment, would Michigan
08:46:20 10 Sugar sell further south into states like Alabama?

08:46:23 11 A. Again, potentially, yes.

08:46:25 12 Q. What do you consider to be the single largest reason
08:46:28 13 that Michigan Sugar is not selling more sugar into these
08:46:31 14 states today?

08:46:31 15 A. Our size. Marketing allocation limitations.

08:46:31 16 Q. You discussed earlier the announcement in August of
08:46:41 17 last year that Michigan Sugar would be building a new
08:46:41 18 desugarization facility. Do you recall that?

08:46:50 19 A. Correct. Yes.

08:46:51 20 Q. And what exactly is that new facility going to enable
08:46:52 21 Michigan Sugar to do?

08:46:52 22 A. So it's basically an expansion of our current
08:47:01 23 desugarization facility.

08:47:04 24 Today we are only able to extract sugar from
08:47:08 25 molasses on 40 percent of our total-sorry, 60 percent of our

08:47:13 1 total production. This is going -- this investment will
08:47:16 2 allow us to desugarize 100 percent of our molasses. And we
08:47:23 3 estimate that will allow us to generate an additional 80
08:47:26 4 million pounds of sugar production, by extracting the sugar
08:47:30 5 off the molasses, without having to increase our acreage one
08:47:36 6 acre.

08:47:36 7 Q. What you mean by that, increase your acreage, is you
08:47:42 8 get 80 more million pounds without needing to plant one more
08:47:45 9 acre of sugar beets by any of your farmers, right?

08:47:49 10 A. That is correct, yes.

08:47:50 11 Q. Essentially you're just getting more sugar out of the
08:47:52 12 beets you currently grow?

08:47:54 13 A. Correct.

08:47:55 14 Q. Has Michigan Sugar begun construction on this
08:47:58 15 facility?

08:47:58 16 A. As of yet, no. We're going through the engineering
08:48:02 17 stages now. But the project has been approved by our board.

08:48:04 18 Q. And when is the facility expected to be completed?

08:48:06 19 A. Summer -- I believe summer of 2024. Spring of 2024.
08:48:15 20 Sorry.

08:48:15 21 Q. Where do you expect to sell the additional sugar
08:48:18 22 you're going to get from that facility?

08:48:22 23 A. We will try to keep as much of it as we can in our
08:48:26 24 geographical area. But if we have to expand the
08:48:32 25 geographical area to get to more customers with the sugar,

08:48:35 1 we will.

08:48:36 2 Q. And does that include expanding into customers, for
08:48:40 3 example, that are in Tennessee?

08:48:43 4 A. Could be.

08:48:44 5 Q. Could be. How about customers in, for example, North
08:48:50 6 Carolina?

08:48:50 7 A. Could be as well.

08:48:52 8 Q. Virginia?

08:48:54 9 A. Could be as well.

08:48:55 10 Q. Even Georgia?

08:48:57 11 A. Could be as well.

08:48:58 12 Q. What types of sugar products does CSC sell?

08:49:00 13 A. To my knowledge, they are predominantly liquid
08:49:01 14 sucrose, liquid sugars.

08:49:01 15 Q. When you sell your sugar to distributors like Indiana
08:49:14 16 Sugars and Batory, do you know where they're taking Michigan
08:49:19 17 Sugar's sugar to resell it?

08:49:20 18 A. No.

08:49:21 19 Q. Because Michigan Sugar itself doesn't sell as much as
08:49:25 20 it would like directly to customers in places like
08:49:27 21 Tennessee, Alabama, South Carolina, what's your view about
08:49:31 22 distributors who use Michigan Sugar's sugar to compete for
08:49:34 23 sales in those areas?

08:49:36 24 A. I mean, listen, if our distributors help us to
08:49:41 25 broaden the coverage area for whatever reason, we certain

08:49:47 1 certainly don't object to it.

08:49:48 2 Q. Is there a benefit to Michigan Sugar from these
08:49:52 3 distributors using your sugar to win customers in states
08:49:55 4 where Michigan Sugar itself is not directly selling today?

08:49:59 5 A. Yeah. Just from a brand recognition standpoint, yes,
08:50:04 6 there is a value.

08:50:05 7 Q. Let's look at page 10 of Exhibit 3, if we can. Let
08:50:10 8 me ask you this, Mr. Figueroa. Does Michigan Sugar witness
08:50:13 9 plenty of liquidity and competitiveness in the marketplace
08:50:17 10 in terms of the number of players, distributors, sales mix
08:50:21 11 capabilities per each major marketer and imported sugar as a
08:50:25 12 complement to domestic production flows to prevent harm to
08:50:29 13 consumers and users overall?

08:50:29 14 A. Yes.

08:50:32 15 Q. I think that would be Exhibit 4 we are going to mark.
08:50:35 16 Mr. Figueroa, are you familiar at all with a request that
08:50:38 17 was made to Michigan Sugar for certain sales data within a
08:50:41 18 certain geography that the government has called "the
08:50:44 19 southeast region." Are you familiar with that request?

08:50:47 20 A. Under the subpoena?

08:50:50 21 Q. Yes.

08:50:53 22 A. Yes.

08:50:56 23 Q. Okay. And are you aware that Michigan Sugar in fact
08:50:59 24 produced certain data about its sales in certain states in
08:51:02 25 the United States?

08:50:58 1 A. Yes.

08:50:58 2 Q. Do you have any reason to believe that that data is
08:51:02 3 not accurate that you produced?

08:51:04 4 A. No.

08:51:04 5 Q. And if that data showed, for example, that Michigan
08:51:09 6 Sugar sold sugar to companies in states and locations like
08:51:13 7 Georgia and Kentucky and North Carolina, that would be in
08:51:17 8 your view accurate?

08:51:18 9 A. Yes.

08:51:18 10 Q. The data is the best source of information for very
08:51:21 11 precisely where Michigan Sugar is selling its sugar.
08:51:27 12 Correct?

08:51:28 13 A. Yes.

08:51:29 14 (End of deposition video.)

08:51:34 15 MR. HANNA: May we call the next witness?

08:51:36 16 THE COURT: Yes.

08:51:41 17 MS. BARRON: Molly Barron on behalf of US Sugar.
08:51:42 18 Defendant would like to move into evidence DTX 34 which is
08:51:46 19 Figuero Exhibit 3, and DTX 244 which is Figuero Exhibit 4.

08:51:50 20 MR. HANNA: No objection, Your Honor.

08:51:52 21 THE COURT: Thank you. Those are admitted.

08:51:51 22 (DTX Exhibit Nos. 34 and 244 were admitted into
08:51:53 23 the record.)

08:51:53 24 MR. HANNA: Your Honor, the United States would
08:51:55 25 like to call Clayton Brown, CEO of International Food

08:51:59 1 Products. Another video by deposition. I believe we are
08:52:02 2 going to ask the courtroom to be closed.

08:52:04 3 THE COURT: So as established in submissions we
08:52:08 4 received from third parties, good cause to close the
08:52:11 5 courtroom, the depositions contain highly confidential and
08:52:15 6 competitive information for those parties, the disclosure
08:52:19 7 which would present an injury to these parties so I'm going
08:52:23 8 to close the courtroom as it's not practical to separate out
08:52:26 9 the confidential portions and the nonconfidential. The
08:52:29 10 parties shall as we talked about provided a line-by-line
08:52:32 11 confidentiality designation so that transcript that will be
08:52:35 12 publicly available includes all of the nonconfidential
08:52:38 13 portions. At this point we will close the courtroom and ask
08:52:41 14 anyone not under the protective orders to leave.

08:52:45 15 MR. HANNA: Thank you, Your Honor.

08:53:01 16 THE COURT: And by that way, that ruling will
08:53:05 17 apply -- I know defendants asked earlier, that ruling
08:53:08 18 applies to the depositions that you intend to play as well.

08:53:11 19 MR. BUTERMAN: Thank you, Your Honor.

08:53:17 20 (Videotape deposition of Clayton Brown:)

08:53:21 21 Q. Can you just state your name for the record?

08:53:24 22 A. My name is Clayton Christopher Brown.

08:53:30 23 Q. And who is your employer?

08:53:40 24 A. The International Companies.

08:53:43 25 Q. And is International Food Products Company one of

08:53:47 1 those companies?

08:53:49 2 A. Yes. Yes, it is.

08:53:53 3 Q. And so if I use IFPC today, you understand that to
08:53:58 4 mean International Food Products Company?

08:54:00 5 A. Yes.

08:54:00 6 Q. And what is your title?

08:54:02 7 A. CEO and president.

08:54:04 8 Q. And does IFPC refine sugar?

08:54:07 9 A. No.

08:54:08 10 Q. Do you have any plans to begin refining raw sugar?

08:54:12 11 A. No.

08:54:14 12 Q. Does IFPC package sugar?

08:54:18 13 A. No.

08:54:18 14 Q. Does IFPC purchase any raw sugar?

08:54:22 15 A. No.

08:54:23 16 Q. Does IFPC buy imported raw sugar?

08:54:28 17 A. No.

08:54:28 18 Q. Does it buy imported refined sugar?

08:54:32 19 A. Yes.

08:54:32 20 Q. About what percentage of your refined sugar are from
08:54:37 21 an importer?

08:54:38 22 A. I'm going to say about five percent.

08:54:42 23 Q. Do you use the same sugar suppliers for all of your
08:54:50 24 distribution centers?

08:54:52 25 A. No.

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Q. Do you buy refined sugar from other distributors?

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A. Yes. I'm going to say yes in emergency if for some reason we need -- you know, we can't get something.

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Q. I'm going to ask Elena to upload into the chat a document. We have it as Tab 6, and this will be Brown Exhibit 2. The document has a Bates number LDC-SRQ 21-ESI-00915623.

Mr. Brown, just let me know when you have been

08:57:55 1 able to open that and have had a chance to look at it?

08:57:58 2 A. Okay. I have it up. Let me take a look at it. I am
08:58:02 3 looking at it now.

08:58:04 4 Q. Now, the top line -- on the first page of this e-mail
08:58:08 5 -- this is an e-mail from you to Jim Evans dated August 29,
08:58:18 6 2019; is that right?

08:58:19 7 A. Yeah, the top of this page -- well, it's from Jim to
08:58:23 8 me -- or no, sorry, to -- it's from Jim Evans to me.

08:58:29 9 Q. Yeah.

08:58:29 10 A. Yes.

08:58:29 11 Q. Thank you for the clarification.

08:58:31 12 So from Jim Evans to you, the top most e-mail is
08:58:31 13 August 29th, 2019, right?

08:58:31 14 A. Correct.

08:58:31 15 Q. And the subject is, RE: ISP price quote from Milkco.
08:58:41 16 Do you see that?

08:58:41 17 A. Correct.

08:58:41 18 Q. Is Milkco an IFP customer?

08:58:51 19 A. Yes, it is.

08:58:52 20 Q. So is it your understanding that Milkco needed liquid
08:58:52 21 sugar delivered to Asheville, North Carolina?

08:58:52 22 A. Correct.

08:58:52 23 Q. Why here are you reaching out to Imperial about your
08:59:02 24 customer's liquid volume needs in North Carolina?

08:59:02 25 A. Because -- well one, we've done it in the past, but

08:59:08 1 their facility in Savannah, Georgia, would be convenient to
08:59:14 2 deliver to Asheville, North Carolina.

08:59:16 3 Q. Why didn't IFPC serve Milkco from one of its liquid
08:59:22 4 sugar facilities?

08:59:23 5 A. Because the -- because it's -- as I said at the
08:59:26 6 beginning, the 350-mile radius, this would be outside of
08:59:30 7 that 350-mile radius. So the freight would be very
08:59:35 8 exorbitant, so we wouldn't be competitive.

08:59:38 9 Q. Did Imperial ultimately provide this liquid sugar
08:59:42 10 you're asking about to Milkco?

08:59:44 11 A. Yes.

08:59:45 12 Q. Were you concerned that Imperial would take this
08:59:49 13 Milkco business from IFPC?

08:59:51 14 A. No, I was not concerned.

08:59:53 15 Q. Why not?

08:59:53 16 A. I -- I guess I'd just say kind of a gentleman's
08:59:59 17 agreement that, you know, we provide -- we provided the
09:00:02 18 customer name and who it is, and they're getting the benefit
09:00:05 19 of selling the sugar and we're the ones -- you know, and
09:00:08 20 selling it as well to Milkco. So they're selling to us, and
09:00:12 21 we're selling to Milkco. So they're still getting --
09:00:15 22 they're getting the sale of the sugar.

09:00:18 23 Q. Did the prices that IFPC charges for refined sugar to
09:00:22 24 its customers change over time?

09:00:24 25 A. Yes.

09:00:25 1 Q. What factors caused IFPC's prices to change for
09:00:29 2 refined sugar?

09:00:31 3 A. The pricing that I receive from the refineries can
09:00:34 4 change, whether it -- I'm buying it quarterly, monthly, or,
09:00:39 5 you know, daily.

09:00:40 6 Q. Can you explain a little bit more? How does kind of
09:00:44 7 that time period affect pricing?

09:00:47 8 A. Well, I should say, you know, it all depends upon how
09:00:51 9 the refineries want to price their sugar. So that can have
09:00:55 10 an impact on what my price is going to be.

09:01:00 11 If it's based off the -- the number 16, like
09:01:04 12 Imperial's are, they can change -- you know, it can change
09:01:08 13 daily, or, you know, weekly depending upon what the market
09:01:12 14 does. And then, you know, again the refineries have the
09:01:16 15 discretion to change pricing whenever they want.

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09:01:34 20 Q. In your experience, does IFPC pay more for Imperial
09:01:38 21 Sugar than you do for sugar from Imperial's competitors?

09:01:42 22 A. It kind of -- it kind of depends upon the market. I
09:01:46 23 mean, lately it's -- you know, Domino always -- has always
09:01:50 24 been a -- has always been a higher priced supplier than --
09:01:54 25 than Imperial.

09:01:57 1 But I don't know how they do their pricing --
09:02:00 2 you know, I don't know how they do their -- their -- when
09:02:03 3 they sell -- I don't know how they go about doing their --
09:02:06 4 what am I trying to -- when they come up with a price for --
09:02:10 5 to me, I'm not sure how they work up their numbers.

09:02:13 6 Q. Where in the U.S. does IFPC sell refined sugar?

09:02:17 7 A. I would say throughout the -- you know -- basically
09:02:21 8 throughout the whole -- the country. I mean, everything
09:02:25 9 from the -- the south -- the southeast -- the south, midwest
09:02:30 10 -- the midwest, and the Pacific northwest.

09:02:32 11 Q. I'm going to go ahead and introduce as Brown
09:02:35 12 Exhibit 10 a document bearing the Bates IFP-US Sugars 00048.
09:02:40 13 And I'm also going to introduce as Exhibit 11 a PDF of that
09:02:50 14 same Excel spreadsheet, just because I personally find the
09:02:55 15 PDF easier to look at. But both the -- Exhibit 10 and
09:03:00 16 Exhibit 11 are a document with Bates IFP-US Sugars 00048.

09:03:10 17 Have you seen Exhibit 10 before?

09:03:15 18 A. Yes, I perform -- I put that together.

09:03:20 19 Q. And did you create Exhibit 10 for the -- for the
09:03:25 20 purposes of this litigation?

09:03:28 21 A. I -- it was just a question that was asked, and so I
09:03:32 22 created this based on the -- to figure out the customers in
09:03:35 23 these different states.

09:03:38 24 Q. And does Exhibit 10 reflect data that IFPC maintains
09:03:42 25 in the ordinary course of its business?

09:03:47 1

A. Yes.

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Q. And is it correct that last year, in 2021, IFPC's

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sales to -- to customers in -- in the states reflected in

09:05:30 5

this document amounted to 5.9 percent of its sugar sales?

09:05:35 6

A. Yes.

09:05:35 7

Q. We talked earlier about how IFPC purchases sugar from

09:05:41 8

companies like United, Domino, Western, Cargill, NSM, and

09:05:48 9

Imperial.

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Is IFPC a customer of those companies?

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A. Yes, we are.

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Q. In your opinion, does Imperial's reliance on foreign

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imports make it a high-cost refiner?

09:06:34 25

A. Yes.

09:06:34 1 Q. In your opinion, does Imperial's reliance on foreign
09:06:38 2 imports make it less competitive as a supplier?

09:06:42 3 A. I wouldn't say less competitive. But you know, their
09:06:48 4 pricing is different, so it does have an impact on -- you
09:06:52 5 know, maybe some business we could do with them.

09:06:54 6 Q. If US Sugar's acquisition of Imperial goes through,
09:06:59 7 do you think that it will reduce the supply of refined sugar
09:07:02 8 in the U.S.?

09:07:03 9 A. I do not -- I don't -- I do not believe so.

09:07:06 10 Q. Why not?

09:07:07 11 A. Because what I understand is, you know, maybe US
09:07:11 12 Sugar may increase the amount of raw sugars that they're
09:07:14 13 currently producing down in -- in Clewiston and be able to
09:07:18 14 ship more up to Port Wentworth, and -- and increase that
09:07:21 15 supply that's available.

09:07:24 16 Q. If US Sugar's acquisition of Imperial goes through,
09:07:27 17 do you think it will lead to higher prices for refined
09:07:31 18 sugar?

09:07:33 19 A. You know, I -- that's, you know -- it's a poss --
09:07:36 20 it's a possibility, but I'm -- you know, the market's going
09:07:40 21 to -- the market's going to determine what they can price it
09:07:43 22 at.

09:07:46 23 Q. Do you think that US Sugar's proposed acquisition of
09:07:50 24 Imperial is good for the sugar industry?

09:07:53 25 A. Yes.

09:07:54 1 Q. Why?

09:07:54 2 A. Again, it -- I think it will -- it will increase the
09:07:58 3 amount of -- amount of sugar available. And I would assume
09:08:02 4 that based on, you know, a little more raws going through
09:08:09 5 Imperial, it will help the efficiency of that facility to
09:08:13 6 run -- you know, maybe run smoother instead of waiting on
09:08:17 7 raw -- on world raws all the time.

09:08:20 8 MR. HANNA: Your Honor, at this time the United
09:08:21 9 States moves to admit the following exhibits into evidence.
09:08:24 10 DTX 113, PTX 202.

09:08:30 11 THE COURT: Any objection?

09:08:31 12 MS. BARRON: No objection.

09:08:32 13 THE COURT: Thank you. They're admitted.

09:08:32 14 (DTX Exhibit No. 113 and PTX Exhibit No. 202
09:08:35 15 were admitted into evidence.)

09:08:35 16 MR. HANNA: Next, Your Honor, the United States
09:08:37 17 calls Meera Ramachandra Hamill, the associate director of
09:08:41 18 commodities.

09:08:41 19 THE COURT: Thank you.

09:08:42 20 (Videotape deposition of Meera Ramachandra
09:08:42 21 Hamill:)

09:08:51 22 A. My name is Meera Ramachandra Hamill.

09:08:52 23 Q. And where do you work?

09:08:52 24 A. I work at Kraft Heinz Company.

09:09:02 25 Q. And what's your current job at Kraft?

09:09:04 1 A. I am the associate director of commodity ingredients.

09:09:09 2 Q. Do you have responsibilities for buying sweeteners
09:09:13 3 for Kraft?

09:09:19 4 A. Yes.

09:09:21 5 Q. Of the Kraft facilities that use refined sugar, are
09:09:25 6 there some facilities that use a majority of the refined
09:09:29 7 sugar that Kraft buys?

09:09:31 8 A. Yes.

09:09:32 9 Q. Which facilities?

09:09:34 10 A. Our largest sugar-using facility would be Dover,
09:09:40 11 Delaware. And then -- I'm thinking. So we have our
09:09:46 12 facilities, you know, in the Midwest that are large use
09:09:51 13 locations, Kendalville, Champaign, Illinois. Then I would
09:10:02 14 say, moving into my liquids, which would be my Capri Sun
09:10:15 15 plants.

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09:10:52 22 Q. What's a core supplier?

09:10:52 23 A. Like a large supplier, I would say, it's one of the
09:11:02 24 big, you know, three sugar suppliers in the -- in the U.S.;
09:11:12 25 three or four.

09:11:14 1 Q. Could you name them?

09:11:23 2 A. I would say Domino, United, LSR, you know, Cargill,
09:11:32 3 and then Imperial Sugar. And then, of course, there's
09:11:39 4 always, you know, NSM, National Sugar Marketing. And then
09:11:47 5 you start going into more regional players.

09:11:51 6 Q. And when you say "regional players," Ms. Hamill, what
09:11:57 7 do you mean?

09:11:58 8 A. There are smaller players such as Michigan Sugar.
09:12:03 9 There is also the local, you know, sugar melters that are in
09:12:10 10 various areas of the country.

09:12:15 11 Q. Let me ask you first about Michigan Sugar. Why would
09:12:23 12 they be considered a regional player?

09:12:25 13 A. Michigan Sugar tends to be only competitive in a
09:12:30 14 certain region of the country.

09:12:31 15 Q. What region would that be?

09:12:35 16 A. It's more or less in Michigan. Ohio. Just in that
09:12:41 17 general vicinity.

09:12:49 18 Q. Are there other regional players?

09:12:51 19 A. There's smaller, you know, players. There's the
09:12:57 20 company that's based out in Denver, Colorado. I can't -- my
09:13:07 21 mind is not clicking right now, because I don't use them.
09:13:12 22 They're a beet sugar supplier. It will come later. But
09:13:18 23 they are included on my bids.

09:13:22 24 Q. Is it Western Sugar?

09:13:23 25 A. Western, yes. Thank you.

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Q. When you say the RFP includes specifications, what do you mean by that?

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A. What is sent with the RFP is the Kraft Heinz specifications which, basically, describe the parameters of the sugar that would be used at our facility, whether it be -- you know, granulation size tends to be critical. You know, the color, making sure it's free flowing. It's parameters like that.

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Q. Why is that included?

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A. We need to ensure that the products that we get from our suppliers are materials that we can, in fact, process and use within our products with no impact.

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Q. Well, now, when we think about awarding the RFP, are there any factors that are important to Kraft in deciding who to award its RFP for refined sugar?

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A. Yes.

09:15:57 8

Q. What are they?

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A. Quality, service, price. I would say those are the, you know, three biggies.

09:16:08 10

09:16:20 11

Q. Why is quality important?

09:16:23 12

A. I need to ensure that the supplier is providing quality product into my facility.

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09:16:32 14

Q. Why is service important?

09:16:34 15

A. I need to make sure that product is available on time, as needed by the factory.

09:16:42 16

09:16:51 17

Q. And why is price important?

09:16:54 18

A. I need to ensure that I'm able to get the lowest landed price into that facility.

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Q. Does the supplier's distance from Kraft's facility play a role in the price?

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A. It generally will.

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Q. How?

09:17:20 24

A. It's based on the freight rate that the supplier is able to provide to that Kraft Heinz location.

09:17:32 25

09:17:38 1 Q. Does the supplier's distance from the Kraft facility
09:17:42 2 matter?

09:17:43 3 A. For me, as long as it's delivered on time as needed
09:17:49 4 at a competitive cost, that is the most important, and, of
09:17:56 5 course, quality and service.

09:17:59 6 Q. Okay. Let's talk now about Dover, Delaware. How
09:18:05 7 much refined sugar does the Dover, Delaware facility buy
09:18:10 8 yearly?

09:18:12 9 A. Approximately 150 million pounds.

09:18:20 10 Q. What products are made in Dover, Delaware?

09:18:27 11 A. Dover Delaware is a facility that produces our dry
09:18:33 12 powdered beverages. They also produce our Jello puddings,
09:18:51 13 and they also produce Stove Top Stuffing.

09:18:56 14 Q. What kind of refined sugar does the Dover, Delaware
09:19:01 15 facility use?

09:19:02 16 A. They use bulk EFG sugar.

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Q. What do you mean by segregation?

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A. So, if you think about dry powdered beverage is made, it's basically sugar, citric acid, some starch, some flavor components. So what you want to do is when you make, you know, powdered materials, you want to make sure that everything stays mixed, so you don't have, like, layering occur within a product canister or package where you have, you know, things floating to the bottom. That it stays uniformly mixed.

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Q. Could Kraft switch to liquid sugar to make Country Time Lemonade and the other powdered products that are made in Dover, Delaware?

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09:21:39 23

A. No.

09:21:40 24

Q. Why not?

09:21:42 25

A. The Dover plant is a dry powdered facility, and

09:21:49 1 liquid sugar is wet.

09:21:57 2 Q. Could Kraft switch to high fructose corn syrup to
09:22:04 3 make Country Time Lemonade and the other powdered products
09:22:08 4 that are made in Dover, Delaware?

09:22:09 5 A. No.

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09:22:35 11

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Q. So that document is Kraft-0000034. Let me ask you first, Exhibit 1, do you recognize Exhibit 1, Ms. Hamill?

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09:24:57 15

A. I do.

09:24:51 16

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Q. Who prepared Exhibit 1?

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A. It would have been prepared by -- probably jointly by myself and -- in this case, Alex Frantz, who was the sugar buyer at that point in time.

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Q. And was Exhibit 1 made in the ordinary course of your duties at Kraft?

09:25:32 24

09:25:34 25

A. Yes, it was.

09:25:36 1 Q. And does Kraft have a large procurement team?

09:25:41 2 A. It does.

09:25:43 3 Q. I think you testified this morning that you believe
09:25:48 4 that there are about 37 manufacturing facilities that use
09:25:55 5 refined sugar; is that right?

09:25:57 6 A. Exactly.

09:25:57 7 Q. Okay. And those 37 Kraft facilities that use refined
09:26:02 8 sugar are located all across the United States, right?

09:26:08 9 A. That is correct.

09:26:08 10 Q. As someone who works in procurement, is it important
09:26:13 11 for you to try to stay up-to-date on developments in the
09:26:20 12 sugar industry?

09:26:21 13 A. Yes.

09:26:21 14 Q. And how do you do so?

09:26:25 15 A. I talk to my suppliers. I read things.

09:26:31 16 Q. Okay. And then you say you read things. What do you
09:26:31 17 read?

09:26:37 18 A. I read market reports.

09:26:39 19 Q. Anything else?

09:26:40 20 A. I talk to industry experts.

09:26:41 21 Q. What sort of market reports do you look at to try to
09:26:42 22 keep abreast of the sugar industry?

09:26:52 23 A. We get information from, you know, third-parties, you
09:27:05 24 know, subscriptions that we pay for.

09:27:12 25 Q. Which third-party subscription services does Kraft

09:27:19 1 subscribe to with respect to sugar?

09:27:21 2 A. There are several. A couple come to mind off the
09:27:26 3 top. We work with JSG. We work with McKeany-Flavell. We
09:27:37 4 get reports from -- I'm going to not pronounce this
09:27:44 5 correctly.

09:27:45 6 Q. That's fine. I'd probably mess it up, too.

09:27:51 7 A. Okay. Czarnikow. You know, the typical cast of
09:27:59 8 characters in the sugar world. So...

09:28:02 9 Q. The first one you mentioned is JSG. What is that?

09:28:06 10 A. That is Jenkins.

09:28:08 11 Q. And what is Jenkins Sugar Group?

09:28:11 12 A. They, basically, you know, follow the markets, you
09:28:18 13 know, give prospective on, you know, what's going on, how
09:28:25 14 the crops are doing. You know, things like that.

09:28:29 15 Q. What sort of form do those -- does that information
09:28:35 16 come to you in? Is it a -- is it a newsletter, or is it a
09:28:39 17 daily e-mail blast, how do you get it?

09:28:42 18 A. It's you know, daily e-mail blasts. You know, pick
09:28:46 19 up the phone, have conversations.

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09:28:54 23 Q. And the number 16 price, that's a raw sugar price
09:28:58 24 index; correct?

09:29:00 25 A. That is correct.

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Q. Do you know who Barb Fecso is?

09:29:46 11

A. She is the -- yes, I do.

09:29:48 12

Q. And who is she?

09:29:51 13

A. She is with the USDA.

09:29:56 14

Q. And do you understand that she runs the USDA sugar

09:30:01 15

program?

09:30:01 16

A. Yes, I do.

09:30:02 17

Q. Do you attend the International Sweetener Colloquium?

09:30:08 18

A. I do.

09:30:09 19

Q. And who do you typically meet with at the

09:30:11 20

International Sweetener Colloquium?

09:30:15 21

A. I meet with all of the sugar, US Sugar suppliers.

09:30:22 22

And I also see Barb.

09:30:27 23

Q. Do you meet with analysts and brokers?

09:30:31 24

A. Yes, I do.

09:30:32 25

Q. Who do you -- who would you meet with?

09:30:35 1 A. I would meet with folks at Jenkins, folks at
09:30:40 2 McKeany-Flavell. I've met with a couple of others, I just
09:30:49 3 don't recall, you know, the names off the top.

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A. I would meet with folks at Jenkins, folks at

McKeany-Flavell. I've met with a couple of others, I just

don't recall, you know, the names off the top.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Q. And based upon the information that you presented in
the 2020 US Sugars strategy recommendation, Imperial has the
highest delivered cost of any of the four suppliers that
Kraft was going to use in 2020 to supply the Dover, Delaware
plant, correct?

A. That is correct.

Q. The majority of Kraft's purchases are by contract,
correct?

A. That is correct.

Q. Would you say it's more than 95 percent?

A. I would say hopefully more than 90 percent. Perhaps
95 percent, but, you know, the majority, yes.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Q. Okay. I think that you testified this morning and gave an example of ASR as a supplier with multiple refinery locations. Do you recall that?

A. Yes, I do.

Q. Because you -- if ASR has a production issue in Baltimore, for example, you can -- you can obtain supply from Yonkers, is that right?

A. Yes, that is correct.

Q. Why is that important to Kraft Heinz?

A. Because I need to ensure continuity of supply into my facility.

09:34:11 1

[REDACTED]

09:34:12 2

Q. And that means that sugar is arriving on a regular

09:34:16 3

basis to the Dover, Delaware facility, correct?

09:34:20 4

A. That's correct.

09:34:24 5

Q. And probably two-thirds of those railcars are coming

09:34:28 6

from Florida, Georgia, or Louisiana; is that right?

09:34:33 7

A. Probably -- probably more -- probably more than that.

09:34:41 8

Probably 90 percent of the rail is coming from those areas.

09:34:45 9

Q. And is that because ASR is primarily shipping from

09:34:51 10

its Chalmette, Louisiana refinery?

09:34:56 11

A. That is correct.

09:34:59 12

Q. Even though the Baltimore, Maryland refinery is

09:35:10 13

considerably closer to Dover, Delaware?

09:35:12 14

A. That is correct.

09:35:13 15

Q. Why is that?

09:35:14 16

A. Because it takes the same amount of time to get from

09:35:17 17

Baltimore to Dover, Delaware via rail as it takes from

09:35:21 18

Chalmette to go to Dover, Delaware.

09:35:21 19

Q. And what's your understanding of why that's the case?

09:35:30 20

A. Because it's a very messy rail challenge in that

09:35:32 21

area.

09:35:32 22

Q. The area between Baltimore and Dover?

09:35:42 23

A. Yes.

09:35:44 24

[REDACTED]

09:35:45 25

[REDACTED]

09:35:53 1

[REDACTED]

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[REDACTED]

09:35:58 3

[REDACTED]

09:35:59 4

[REDACTED]

09:36:05 5

[REDACTED]

09:36:08 6

[REDACTED]

09:36:09 7

[REDACTED]

09:36:13 8

[REDACTED]

09:36:18 9

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[REDACTED]

09:36:28 11

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

09:36:43 15

[REDACTED]

09:36:45 16

[REDACTED]

09:36:47 17

Q. And this document is dated July 30th of 2021,

09:36:52 18

correct?

09:36:52 19

A. That's what it shows, yes.

09:36:52 20

Q. Okay. And this is a document that you and your team

09:37:00 21

prepared --

09:37:01 22

A. Yes.

09:37:02 23

Q. -- in the ordinary course of your job duties at Kraft

09:37:05 24

Heinz?

09:37:06 25

A. Yes.

09:37:07 1 Q. Submitted to your -- to your management team, right?

09:37:11 2 A. That is correct.

09:37:12 3 Q. Okay. If I can get you to turn to slide 11 of

09:37:15 4 Exhibit 4.

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Q. Ms. Hamill, while we were off the record, I had
marked Exhibit 5.

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(End of videotape deposition.)

MS. BARRON: Your Honor, defendants would like to move into evidence JTX 013, which is Hamill Exhibit 1; JTX 014, which Hamill Exhibit 4; and JTX 048, which is

09:43:00 1 Hamill Exhibit 5A.

09:43:00 2 MR. HANNA: No objection, Your Honor.

09:43:01 3 THE COURT: Thank you. Those are admitted.

09:43:01 4 (JTX Exhibit Nos. 013, 014 and 048 were admitted
09:43:03 5 into evidence.)

09:43:03 6 MR. HANNA: And finally, Your Honor, the United
09:43:06 7 States calls Mark Olson, vice-president of trade for
09:43:09 8 American Sugar Refinery Company.

09:43:16 9 (Videotape deposition of Mark Olson:)

09:43:47 10 Q. Mr. Olson, who do you currently work for?

09:43:50 11 A. I work for American Sugar Refining ASR.

09:43:54 12 Q. What line of business is ASR in?

09:43:58 13 A. We are a cane refiner business, we buy and process
09:44:08 14 raw sugar into refined sugar, a variety of forms.

09:44:12 15 Q. What is your current job title at ASR?

09:44:17 16 A. I believe I am vice-president of trading, simple as
09:44:22 17 that.

09:44:22 18 Q. And what are your jobs duties as vice-president of
09:44:28 19 trading?

09:44:29 20 A. I procure all of the raw sugar for four of the five
09:44:32 21 refineries we have in the United States.

09:44:32 22 Q. Does your job at ASR involve selling refined sugar to
09:44:40 23 customers in the United States?

09:44:42 24 A. It does not.

09:44:42 25 Q. ASR does not use sugar beets to make refined sugar,

09:44:54 1 does it?

09:44:55 2 A. That is correct, we do not.

09:44:58 3 Q. ASR is a cane only company?

09:45:01 4 A. We're a cane only company.

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09:45:27 12 Q. At a high level, what effect, if any, does the United
09:45:31 13 States government have on the quantity of raw sugar that is
09:45:34 14 available to ASR for purchase for its refineries in the
09:45:39 15 United States?

09:45:40 16 A. The USDA has a large impact on our raw sugar supply
09:45:44 17 and the available raws that we as importers can access.

09:45:51 18 Q. What is your understanding of the basis for your
09:46:01 19 prior answer that the USDA has a significant impact on the
09:46:07 20 amount of raws that are available for ASR's purchase?

09:46:12 21 A. It's as simple as that. That the USDA manages the
09:46:20 22 system and determines access for raw sugar and potentially
09:46:25 23 refined sugar into the United States.

09:46:28 24 Q. When you say the USDA manages the system, what do you
09:46:32 25 mean, sir?

09:46:33 1 A. I mean that they make the call. They determine who
09:46:40 2 gets quotas, they determine if they're going to be
09:46:44 3 additional quotas to the trade negotiated quotas. They
09:46:53 4 manage basically supply and demand in the whole system.

09:46:59 5 Q. And it sound like you're familiar with the actions of
09:47:03 6 the USDA, is that true?

09:47:06 7 A. I lobby USDA for more raw sugar every day.

09:47:11 8 Q. And why are you lobbying the USDA for more sugar
09:47:15 9 every day on behalf of ASR?

09:47:19 10 A. I would like to buy raw sugar at the cheapest price.

09:47:24 11 Q. And the USDA can impact the ability of ASR to
09:47:30 12 purchase raw sugar at the cheapest price, is that true?

09:47:34 13 A. Yes.

09:47:34 14 Q. So you mentioned the quotas being a million point --
09:47:40 15 1.2 million tons, correct?

09:47:41 16 A. Yes, sir.

09:47:42 17 Q. And those are the quotas set by the United States
09:47:45 18 Department of Agriculture?

09:47:46 19 A. Yes, sir.

09:47:47 20 Q. And if you set the quotas aside, how much raw sugar
09:47:52 21 can be purchased for import into the United States?

09:47:54 22 A. Infinity, if I pay a high-tier duty.

09:47:54 23

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Q. Has ASR had any occasion to buy refined sugar in the last three years?

A. Yes.

Q. And when was that?

A. I think at least two out of the three years, and possibly three out of the last three years we have purchased refined sugar from LSR.

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Q. Why does ASR import raw sugar for itself?

09:51:49 10

A. Because our melt requirements are in excess of the

09:51:54 11

domestic supply.

09:51:55 12

Q. The USDA does not set any prices for raw sugar, does

09:52:00 13

it?

09:52:02 14

A. They follow the law, the Farm Bill only has one

09:52:10 15

metric, which is zero forfeitures, zero costs, I guess, you

09:52:19 16

call those two metrics. And then there are -- other metrics

09:52:21 17

are adequate supplies and reasonable price, there is no

09:52:26 18

price. Just words.

09:52:29 19

Q. So just to make sure we're clear on this, USDA

09:52:32 20

doesn't set prices for raw sugar, right?

09:52:35 21

A. They do not set prices for raw sugar, supply and

09:52:38 22

demand does.

09:52:39 23

Q. USDA doesn't control domestic production of sugar,

09:52:42 24

does it?

09:52:43 25

A. No. But since the suspension agreement was put in

09:52:49 1 place, domestic production will impact the amount of supply
09:52:53 2 in the market as it relates to Mexico.

09:52:57 3 Q. USDA doesn't direct domestic production of sugar, is
09:53:02 4 that right?

09:53:02 5 A. That is correct.

09:53:03 6 Q. Does USDA direct the demand for sugar in some way?

09:53:10 7 A. No, you do. You either eat it or you don't. And we
09:53:20 8 report that every month, you know, what we've sold to the
09:53:24 9 U.S. government so that helps inform their guesses on
09:53:30 10 demand. They have a -- you know, they are adjusting,
09:53:35 11 tweaking U.S. consumption every month based on reporting by
09:53:39 12 sugar beets and cane sugar guys and imports of refined.

09:53:43 13 Q. Does the USDA control the port of entry for imported
09:53:48 14 raw sugar?

09:53:49 15 A. No, but I wish they did. They do not.

09:53:53 16 Q. Does ASR generally wish that the USDA would allow for
09:53:58 17 additional imports every year?

09:54:00 18 A. I think generally yes.

09:54:04 19 Q. Why is that?

09:54:07 20 A. Because it gives us an opportunity to potentially buy
09:54:12 21 raw sugar at a lower price if the supply were adequate.

09:54:15 22 Q. Do you consider Imperial to be a competitor of ASR?

09:54:20 23 A. Yes, I consider them to be a competitor of ASR.

09:54:24 24 Q. Mr. Olson, how long have you known Mike Gorrell?

09:54:30 25 A. Not since he was a baby but since he first entered

09:54:37 1 the sugar business as an employ of Cargill.

09:54:42 2 Q. About when --

09:54:44 3 A. I don't know, over twenty years.

09:54:47 4 Q. Would you describe Mr. Gorrell as a friend of yours?

09:54:52 5 A. I would describe him as a trusted friend of mine.

09:54:56 6 Q. How often do you talk with Mr. Gorrell?

09:55:02 7 A. Depending on weather, once or twice a year. If there
09:55:07 8 is bad weather, I might speak to him more frequently.

09:55:12 9 Q. Did you and Mr. Gorrell have any discussion about
09:55:14 10 what impact, if any, such a transaction between US Sugar and
09:55:21 11 Imperial might have on refined sugar prices?

09:55:23 12 A. No. We have never talked about price.

09:55:28 13 Q. Did you have any discussions with others at ASR about
09:55:31 14 what impact, if any, a potential combination of US Sugar and
09:55:37 15 Imperial might have on refined sugar prices?

09:55:41 16 A. No.

09:55:47 17 Q. Mr. Olson, is the second e-mail down in the chain on
09:55:48 18 Exhibit 11 an e-mail you sent on March 25th, 2021 in the
09:55:52 19 ordinary course of your work at ASR?

09:55:55 20 A. Yes.

09:55:58 21 Q. Is the Mike referenced there, Mike Gorrell or someone
09:56:00 22 else?

09:56:02 23 A. Yes, it's Mike Gorrell.

09:56:03 24 Q. The next sentence says, "We can help us to stay
09:56:08 25 close." Do you see that?

09:56:08 1 A. Yes, sir.

09:56:09 2 Q. How is it that you want to be close to United?

09:56:14 3 A. Adam Whitaker, "It's going to be more important than

09:56:19 4 ever to stay close to United. We might want to start

09:56:24 5 thinking of ways to work with them, i.e., asking them for

09:56:28 6 quotes [REDACTED] " I meant, buying refined

09:56:34 7 sugar from them similar to what we do with LSR.

09:56:37 8 Q. The next sentence you wrote Mike and IMP have no

09:56:42 9 choice but to maintain the cane price approach, do you see

09:56:45 10 that?

09:56:45 11 A. Yes, sir.

09:56:46 12 Q. And IMP there refers to Imperial, right?

09:56:49 13 A. That's right.

09:56:51 14 Q. What is the cane price approach you're referring to

09:56:54 15 in this e-mail?

09:56:55 16 A. Mr. Yates called it input cost, but the cane refiners

09:57:01 17 buy raw sugar and then they put costs on top and Imperial

09:57:14 18 likely will never not be able to not use that model because

09:57:21 19 raw cost is the raw cost. It all starts with what you pay

09:57:31 20 for raw sugar.

09:57:32 21 Q. What do you mean by indeed it's likely that this

09:57:32 22 approach will leak back into United/US Sugar's business?

09:57:42 23 A. Yeah. That was simply a reference to sugar beets and

09:57:52 24 one cane guy, US Sugar don't buy raw sugar, and therefore

09:58:02 25 don't give it any consideration when they price their

09:58:09 1 product.

09:58:10 2 Q. But with the addition of Imperial to US Sugar, that
09:58:15 3 means there would be more cane sugar being sold by United,
09:58:19 4 is that right?

09:58:23 5 A. That is right.

09:58:24 6 Q. What you're expressing in this e-mail is that that
09:58:26 7 means that United is more likely to use a price based on the
09:58:31 8 cane sugar price; is that correct?

09:58:33 9 A. I am speculating that they would have to consider
09:58:36 10 that as it relates net tons.

09:58:41 11 Q. And you're expressing in this e-mail that that would
09:58:44 12 be a likely a good thing for ASR; is that right?

09:58:49 13 A. Yeah, that is simply stating that they're going to
09:59:00 14 have to consider their input costs when competing with us.

09:59:05 15 Q. So that sentence in whole, is it fair to say, saying
09:59:11 16 that the transaction between US Sugar and Imperial would
09:59:18 17 increase the portion of United's sales of cane sugar as
09:59:23 18 compared to beet sugar potentially affecting United's
09:59:28 19 pricing which would be a good thing for ASR, is that fair?

09:59:31 20 A. I'm saying that they'll likely have to at least treat
09:59:40 21 that supply similar to how we treat our supply and that
09:59:44 22 doesn't mean that prices are going to go up or down, it's
09:59:48 23 just a consideration of where raw sugar prices are, so if
09:59:52 24 raw sugar prices are going to go down, the prices will go
09:59:55 25 down, if the raw sugar prices go up, the price will go up.

10:00:00 1 Q. You're saying it's good for ASR that United's
10:00:00 2 approach will be more aligned with the cane price approach
10:00:09 3 that ASR uses; isn't that right?

10:00:09 4 A. I can't speculate how it would change, how they treat
10:00:13 5 it, that beet sugar that they would market or even frankly
10:00:17 6 the US Sugar that they market, just raw sugar that they make
10:00:25 7 into refined.

10:00:27 8 Q. How will ASR obtain raw sugar for its facilities in
10:00:32 9 Baltimore, Yonkers if raw sugar from US Sugar cane that's
10:00:38 10 milled at ASR Florida mills starts to be redirected to
10:00:42 11 Savannah?

10:00:43 12 A. I'll be more dependent on offshore quotas and he'll
10:00:47 13 be less dependent on offshore quotas, so it's a one-for-one.

10:00:53 14 Q. Did ASR ever consider buying Imperial?

10:00:59 15 A. I don't believe that we'd be allowed to based on our
10:01:02 16 geography, but if we could, we would.

10:01:06 17 Q. Mr. Olson, I'm just trying to understand what you
10:01:09 18 meant by geography being a factor?

10:01:12 19 A. I mean, they're right next to Baltimore -- I'm right
10:01:15 20 between Baltimore and Florida.

10:01:18 21 Q. So it's an antitrust concern?

10:01:21 22 A. Yes.

10:01:24 23 Q. Mr. Olson, do you have Exhibit 5 in front of you
10:01:27 24 again?

10:01:29 25 A. Not yet. Yes.

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10:02:33 19 Q. Did you draft any of the slides in Exhibit 5?

10:02:37 20 A. No. You mean the appendix? Let me look. No.

10:03:00 21 Q. Did you review or approve any of the slides in
10:03:02 22 Exhibit 5 before it was circulated at ASR?

10:03:10 23 A. No, sir.

10:03:13 24 Q. And what steps, if any, did you take to confirm the
10:03:17 25 accuracy of any information contained in Exhibit 5?

10:03:20 1 A. I took no steps to confirm the accuracy of the data
10:03:24 2 in five.

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(End of videotape deposition.)

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MR. HANNA: Your Honor, at this time the United States moves to admit PTX 046 into evidence.

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MS. BARRON: No objection. And the defendants would like to move into evidence DTX 041, which is Olson Exhibit 5.

10:03:47 11

THE COURT: All right. No objection?

10:03:49 12

MR. HANNA: No objection, sorry.

10:03:51 13

THE COURT: Those are both admitted.

10:03:54 14

10:03:56 15

I will say that when I was reading through this testimony that you gave me and listening, you didn't put in page 201, lines 14 through 24-four.

10:03:59 16

10:04:01 17

MR. HANNA: Your Honor, we will correct that. I apologize, Your Honor.

10:04:04 18

10:04:06 19

THE COURT: Do you want to just -- did you mean to put it in, you can just read it into the record. On page 7. It's 201:14 to 201:24, does ASR typically transfer raw sugar among its facilities by both rail and other means?

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MR. HANNA: Yes, Your Honor, I'll read it into the record.

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10:04:24 25

"QUESTION: Does ASR typically transfer raw

10:04:49 1 sugar among its facilities by boat, rail or other means?

10:04:54 2 "ANSWER: The Florida sugar travels on the Jones
10:04:59 3 Act Barges that we have been talking about, Texas Sugar and
10:05:02 4 Louisiana comes in a combination of the 1,500 ton barges and
10:05:07 5 the 30-ton trucks United was the supplier trucks. Bulk
10:05:11 6 markets primarily oceangoing, big oceangoing vessel and
10:05:16 7 Crockett, et cetera, a big oceangoing vessels."

10:05:20 8 Thank you.

10:05:20 9 THE COURT: At this point can we unseal the
10:05:23 10 courtroom?

10:05:23 11 MR. HANNA: Yes, Your Honor.

10:05:25 12 THE COURT: All right. Let's do that.

10:05:26 13 (Courtroom unsealed.)

10:05:29 14 THE COURT: And now the government closes its
10:05:31 15 case?

10:05:31 16 MR. HANNA: The government closes its case in
10:05:34 17 chief. As I mention earlier, we may reserve some time for
10:05:37 18 rebuttal.

10:05:38 19 THE COURT: Okay. Defendant.

10:05:40 20 MR. BUTERMAN: Your Honor, the defendant will
10:05:42 21 call our first witness, Mr. Robert Buker. He's the CEO of
10:06:00 22 US Sugar.

10:06:22 23 COURT CLERK: Can you please raise your right
10:06:24 24 hand. Please state and spell your full name for the record.

10:06:32 25 THE WITNESS: Robert H. Buker, Jr., R-O-B-E-R-T.

Buker - direct

10:06:40 1 H. B-U-K-E-R, J-R.

10:06:44 2 ROBERT H. BUKER, JR., having been duly sworn was
10:06:50 3 examined and testified as follows:

10:07:13 4 MR. BUTERMAN: May I proceed, Your Honor?

10:07:14 5 THE COURT: Please.

10:07:14 6 MR. BUTERMAN: Thank you.

10:07:15 7 DIRECT EXAMINATION

10:07:15 8 BY MR. BUTERMAN:

10:07:16 9 Q. Good morning, Mr. Buker.

10:07:17 10 A. Good morning.

10:07:18 11 Q. You just make sure that you're speaking up to into
10:07:21 12 the microphone.

10:07:24 13 A. Good morning.

10:07:24 14 Q. Mr. Buker, what's your position at US Sugar?

10:07:27 15 A. I am president and chief executive officer.

10:07:30 16 Q. And how long have you been the president and chief
10:07:34 17 executive officer at US Sugar?

10:07:36 18 A. Since 2005.

10:07:38 19 Q. When did you first join US Sugar?

10:07:41 20 A. 1986.

10:07:42 21 Q. And what are your responsibilities as the president
10:07:42 22 and CEO of US Sugar?

10:07:42 23 A. I am responsible for reporting to the board of
10:07:52 24 directors, for hiring the management team, for leading the
10:07:52 25 strategic planning activities. And because we're an

Buker - direct

10:08:06 1 operating company, for insuring that we have operational
10:08:09 2 excellence and shareholder relations, and I also safeguard
10:08:13 3 the valleys.

10:08:14 4 Q. Mr. Buker, where did you go to college?

10:08:17 5 A. Wheaton College in Wheaton, Illinois.

10:08:21 6 Q. I know you're modest about this, but what did you do
10:08:24 7 after college?

10:08:25 8 A. I was -- I served in the Army for seven years.

10:08:29 9 Q. What did you do in the Army?

10:08:31 10 A. I was a helicopter pilot.

10:08:31 11 Q. This was during Vietnam?

10:08:35 12 A. That era, yes.

10:08:37 13 Q. Do you have any post-college education?

10:08:40 14 A. Yes. I went to law school at the University of
10:08:43 15 Florida.

10:08:44 16 Q. That was on the GI Bill?

10:08:46 17 A. Yes.

10:08:46 18 Q. And what did you do after law school?

10:08:48 19 A. I went to work for a commercial law firm in Miami
10:08:52 20 whose clients included US Sugar.

10:08:52 21 Q. And how did you end up becoming the CEO of US Sugar?

10:09:01 22 A. Well, they hired me as their first in-house counsel
10:09:05 23 and then I started doing when I was inside all the crummy
10:09:10 24 management jobs that nobody else wanted and then they found
10:09:13 25 out I sort of had some kind of talent for building and

Buker - direct

10:09:17 1 improving factories.

10:09:20 2 Q. Who owns US Sugar?

10:09:23 3 A. The largest shareholder is the employees through an
10:09:28 4 employee stock ownership plan. The second largest is
10:09:31 5 Children's Health Center in Michigan. And then the third
10:09:35 6 largest is a charity like the Ford Foundation but based on
10:09:41 7 old General Motors money. Then there is a series of smaller
10:09:45 8 charities and a series of smaller shareholders by decedents
10:09:51 9 of the founder.

10:09:52 10 Q. You said a moment ago that US Sugar's employees own a
10:09:55 11 large share of US Sugar. How many people work for the
10:09:58 12 company?

10:09:58 13 A. It varies during the year, but 2,000 is a good
10:09:58 14 average.

10:10:04 15 Q. What's US Sugar's business?

10:10:06 16 A. We farm and then we process agricultural products.

10:10:12 17 Q. Which agricultural products?

10:10:14 18 A. Sugarcane, oranges, sweet corn.

10:10:21 19 Q. How long has US Sugar been in the farming business?

10:10:25 20 A. Since 1931.

10:10:26 21 Q. And has US Sugar been growing sugarcane that entire
10:10:31 22 time?

10:10:32 23 A. Yes.

10:10:32 24 Q. Where is the company based?

10:10:34 25 A. In Clewiston, Florida, which is on lake Okeechobee,

Buker - direct

10:10:40 1 halfway between West Palm on the east coast and Fort Myers
10:10:43 2 on the west coast.

10:10:44 3 Q. And why is it based in Clewiston, Florida?

10:10:48 4 A. That's somewhat central to our landholdings.

10:10:52 5 Q. Now, can you explain to me how the sugarcane -- how
10:10:59 6 sugar -- explain to me how sugarcane goes from a plant in
10:11:03 7 the ground to those white granules that I poured into my
10:11:07 8 coffee this morning?

10:11:08 9 A. Certainly. I thank you for that. But we grow
10:11:14 10 sugarcane which is a grass botanical and it forms a stalk
10:11:18 11 about ten feet high after growing about fourteen to
10:11:22 12 fifteen months. We cut that with a combine and it's chopped
10:11:26 13 into about eighteen inches sections, transport that to the
10:11:31 14 raw sugar mill by rail where it's unloaded and crushed in
10:11:38 15 giant rollers and then we wash that crushed stalk six times
10:11:42 16 which extraction the juice that has the sugar in it. Then
10:11:46 17 that juice is boiled and concentrated and boiled and
10:11:52 18 concentrated, when it's really gelatinous and thick, we
10:11:56 19 crystalize it. We take those crystals and put them a
10:11:59 20 centrifugal which will spin two tons, it's like a giant
10:12:04 21 clothes dryer, it will spin out the molasses. And then that
10:12:08 22 product is shipped over to the refinery where the crystal is
10:12:12 23 remelted and filtered, more molasses is spun out then it's
10:12:20 24 recrystalized. Then we put the crystals into a giant tower
10:12:24 25 and sift them out to different grain sizes because some

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10:12:28 1 customers have grain size specifications, and then from
10:12:32 2 there it either goes out in bulk or it's package in various
10:12:36 3 package sizes.

10:12:38 4 Q. Who sells the refined sugar that you just described
10:12:42 5 being made?

10:12:43 6 A. United Sugars agricultural cooperative.

10:12:47 7 Q. Why doesn't US Sugar sell its own sugar?

10:12:51 8 A. We're an operating company. Sales is not in our
10:12:55 9 corporate DNA at all. But secondly, it is far more
10:13:01 10 efficient to sell through a cooperative.

10:13:03 11 Q. Does US Sugar decide to whom United sells the refined
10:13:08 12 sugar that US Sugar produces?

10:13:10 13 A. Not at all.

10:13:10 14 Q. Does US Sugar set the price that United must sell its
10:13:15 15 sugar for?

10:13:16 16 A. Not at all.

10:13:16 17 Q. Who decides how much sugarcane US Sugar grows each
10:13:21 18 year?

10:13:21 19 A. The management team led by me.

10:13:25 20 Q. Is there -- how does the allocation fit into that
10:13:30 21 step?

10:13:30 22 A. The USDA sets a domestic allocation for each domestic
10:13:37 23 producer and we cannot sell into the U.S. food market any
10:13:42 24 more sugar than is in our allocation.

10:13:45 25 Q. How is US Sugar compensated for the refined sugar

Buker - direct

10:13:49 1 that United sells on its behalf?

10:13:51 2 A. All the sugar from the various members of United is
10:13:56 3 pooled, so there is a -- and the revenue is pooled. So
10:14:01 4 there is a revenue number. And from that is subtracted the
10:14:06 5 pooled costs which includes overhead, sales, bad debts,
10:14:11 6 break, everything, and then that comes to a net number which
10:14:14 7 we call the net selling price. And then my -- at US Sugar
10:14:19 8 our portion of that is the amount of sugar that we produced
10:14:22 9 that year over the denominator which is all the sugar that
10:14:24 10 United had that year, we get that percentage.

10:14:32 11 Q. So if I understand what you're saying, each of the
10:14:35 12 members gets the same net selling price, but if US Sugar
10:14:40 13 produces more sugar, it's going to get more of that net
10:14:44 14 selling price, is that fair?

10:14:46 15 A. That is correct.

10:14:48 16 THE COURT: Can I ask one question? When you
10:14:51 17 say the allocation is producers, is that growers?

10:14:56 18 THE WITNESS: No, a producer of raw sugar mill,
10:15:01 19 so it may be a grower, it may not. And for the beets, it's
10:15:04 20 their beet refineries, so it goes to the factories that
10:15:10 21 process the agricultural product.

10:15:12 22 Q. Let me see if I can clarify. Could you give us
10:15:15 23 examples of the companies that you understand receive
10:15:20 24 allocation from the USDA?

10:15:22 25 A. In our case we have one, and it supports our cane and

Buker - direct

10:15:30 1 our independent grower's cane and then in Florida there is a
10:15:34 2 company called two if Sugarcane Growers Cooperative of
10:15:39 3 Florida it has an allocation but it's owned by the farmers.

10:15:43 4 Another one you heard, I understand testimony
10:15:44 5 from Michigan Sugar it's the same thing, it's a beet
10:15:48 6 cooperative owned by their farmers and it has an allocation.

10:15:52 7 THE COURT: Okay. That helps, thank you.

10:15:54 8 Q. Now in this case the government has stated that
10:15:57 9 United operates a refinery in Clewiston, Florida. Is that
10:16:02 10 correct?

10:16:02 11 A. No.

10:16:03 12 Q. Who operates the refinery in Clewiston, Florida?

10:16:04 13 A. US Sugar, we do.

10:16:08 14 Q. And in this case, the government has repeatedly
10:16:11 15 contended that United is the entity that for all intensive
10:16:17 16 purposes is acquiring Imperial. What's your response to
10:16:20 17 that?

10:16:20 18 A. I would like justice to call my bankers and tell them
10:16:24 19 that. But the answer is no, it is US Sugar.

10:16:28 20 Q. Now, does US Sugar currently grow more sugarcane than
10:16:32 21 it's able to process?

10:16:35 22 A. Yes.

10:16:38 23 Q. And what happens to the sugarcane that US Sugar can't
10:16:42 24 process?

10:16:45 25 A. We sell it to the other raw sugar mills in Florida.

Buker - direct

10:16:43 1 Q. And do those mills turn the sugarcane into raw sugar
10:16:48 2 and sell that?

10:16:49 3 A. They do.

10:16:50 4 Q. Approximately how much sugarcane does US Sugar sell
10:16:54 5 to third-party mills each year?

10:16:56 6 A. It depends on the size of the crop, but it's between
10:17:00 7 750,000 to 1,500,000 tons of sugarcane a year goes to the
10:17:06 8 other raw sugar mills.

10:17:08 9 Q. Could US Sugar's facility at Clewiston refine the
10:17:12 10 additional raw sugar milled by those third-party mills?

10:17:14 11 A. No.

10:17:16 12 Q. Why not?

10:17:18 13 A. We are already operating at above nameplate capacity
10:17:24 14 and we have to run it full out.

10:17:26 15 Q. Does US Sugar seek to maximize its refined sugar
10:17:31 16 output?

10:17:31 17 A. Absolutely.

10:17:32 18 Q. And why does US Sugar seek to maximize its refined
10:17:37 19 sugar output?

10:17:37 20 A. We are a highly fixed costs business, and by that
10:17:42 21 what I mean is it cost me almost the same whether I make a
10:17:45 22 hundred pounds or a million pounds of sugar, because so many
10:17:48 23 of those costs you just have to spend like when you farm an
10:17:51 24 acre, you spend, the tractor goes through it whether you get
10:17:52 25 one stock of cane or a million. So to lower the unit costs,

Buker - direct

10:18:00 1 I need as many units being made as possible. And then that
10:18:04 2 increases profitability.

10:18:06 3 Q. So what would happen if US Sugar reduced its output
10:18:10 4 of refined sugar?

10:18:12 5 A. It would be devastating economically because our unit
10:18:15 6 costs of what we did produce would just skyrocket.

10:18:21 7 Q. And why do you believe they would skyrocket?

10:18:26 8 A. We see that happen when like this year we've had a
10:18:29 9 freeze, and we didn't make quite as much sugar as we should
10:18:31 10 have and our costs just go through the roof.

10:18:31 11 Q. Now, since you have become the CEO of US Sugar,
10:18:40 12 what's happened to US Sugar's refined sugar output?

10:18:41 13 A. Approximately doubled our output.

10:18:41 14 Q. And what has US Sugar done to increase its refined
10:18:51 15 sugar output during your tenure?

10:18:51 16 A. Well, the first thing I did was put the right people
10:18:51 17 in, like Neil Smith runs our manufacturing operations, but
10:18:51 18 then we put in operational excellence and maintenance
10:19:01 19 excellence where we seek to increase the daily average of
10:19:02 20 what's going on, we measure everything, so it's worked.

10:19:12 21 Q. Why is US Sugar acquiring Imperial?

10:19:12 22 A. There is a number of reasons. And not in order of
10:19:22 23 significance, just in the order in which I remember them.
10:19:24 24 But one is as you've mentioned we produce more sugarcane
10:19:32 25 than we can process. And right now, I'm only getting the

Buker - direct

10:19:35 1 agricultural profits. But if I own another refinery, then I
10:19:41 2 can acquire that raw sugar and refine it myself and I pick
10:19:44 3 up two of the three buckets of profits, the AG profits and
10:19:49 4 the refining, I won't have the raw sugar.

10:19:51 5 Q. Let me just stop there to make sure I understand. So
10:19:54 6 what you're saying, is you have the -- you grow the sugar,
10:19:58 7 you grow the sugarcane so that's one part of it?

10:20:01 8 A. Yes.

10:20:01 9 Q. And then you have to sell it to the mill because you
10:20:08 10 don't have any more milling capacity, is that correct?

10:20:10 11 A. That's correct.

10:20:11 12 Q. Okay. But then if you own Imperial, now you can buy
10:20:16 13 it back from the mills and refine it in Port Wentworth?

10:20:21 14 A. That is correct.

10:20:21 15 Q. I'm sorry I interrupted you.

10:20:24 16 A. Other reasons, Imperial makes products that we do not
10:20:29 17 including brown and powdered sugar. I think that's very
10:20:32 18 good. I also since we're highly fixed costs, I can spread
10:20:37 19 my overhead. Right now Louis Dreyfus charges Imperial 5
10:20:42 20 million a year for overhead, and we can do it a lot cheaper,
10:20:47 21 because we won't need to add very many people, we can fold
10:20:51 22 it right in, that will lower the costs at Wentworth, but
10:20:56 23 also lower the cost at Clewiston, so those are some of the
10:21:00 24 reasons we want to do it.

10:21:02 25 It's also a hedge against weather. We're a farm

Buker - direct

10:21:05 1 in hurricane alley and like this year we sometimes have
10:21:09 2 winter freezes and we've already sold a lot of that sugar
10:21:12 3 with customer commitments and then if your crop gets hurt,
10:21:16 4 we can't cover it.

10:21:17 5 If I had Wentworth, which goes on imported sugar
10:21:21 6 a lot of it, we could cover our problems once we had a
10:21:26 7 weather phenomenon, so that's another good reason. And also
10:21:32 8 in the Farm Bill, twice in modern history the Congress has
10:21:36 9 not renewed the Farm Bill. When that happens, a port
10:21:40 10 refinery which imports raw sugar is a much better economic
10:21:44 11 situation than growing it here in the United States.

10:21:50 12 Q. Could you please turn to JTX 34 in your binder, sir.

10:21:54 13 A. All right.

10:21:58 14 Q. And JTX 34, this is -- could you tell us what this
10:22:04 15 is?

10:22:08 16 A. This looks like it is pages from a report that I made
10:22:14 17 to the board of directors on the Imperial acquisition.

10:22:18 18 MR. BUTERMAN: Your Honor, I don't believe there
10:22:24 19 are any objections, and we would ask to move JTX 34 into
10:22:28 20 evidence.

10:22:32 21 MR. NIERLICH: No objection, Your Honor.

10:22:36 22 THE COURT: Thank you. It's admitted.

10:22:40 23 (JTX Exhibit No. 34 was admitted into evidence.)

10:22:44 24 BY MR. BUTERMAN:

10:22:48 25 Q. Now, Mr. Buker, does US Sugar have an agreement with

Buker - direct

10:22:34 1 any of those third-party mills that you mentioned a few
10:22:38 2 moments ago to acquire the raw sugar produced from
10:22:41 3 sugarcane?

10:22:42 4 A. We do.

10:22:43 5 Q. Which -- how many -- with which entities do you have
10:22:52 6 an agreement?

10:22:53 7 A. We have an agreement with the Sugarcane Growers
10:22:58 8 Cooperative of Florida.

10:22:58 9 Q. And what will that agreement entail?

10:23:01 10 A. Well, it entails that I can shift all of my excess
10:23:08 11 cane there, and it entails the method that they will pay us
10:23:13 12 for that cane which is their standard method, but then it
10:23:16 13 gives me the right to buy all of the raw sugar produced from
10:23:19 14 that cane at a standing price.

10:23:23 15 Q. At a more general level, does this transaction
10:23:27 16 provide US Sugar with the opportunity to be able to refine
10:23:31 17 all of the sugarcane that it grows?

10:23:33 18 A. Yes.

10:23:34 19 Q. And that's not currently happening, correct?

10:23:36 20 A. No, it is not.

10:23:37 21 Q. And about how much raw sugar produced from US Sugar's
10:23:42 22 sugarcane does US Sugar anticipate being able to send to
10:23:44 23 Port Wentworth?

10:23:46 24 A. Again, it depends on the crop and the weather
10:23:51 25 conditions, but somewhere between one-and-a-half and three

Buker - direct

10:23:54 1 million hundredweight.

10:23:56 2 Q. To your knowledge, does Imperial currently grow any
10:24:01 3 sugarcane itself?

10:24:02 4 A. No, it does not.

10:24:03 5 Q. And do you know where Imperial sources the raw sugar
10:24:06 6 that it uses to produce refined sugar?

10:24:09 7 A. Yes. They buy some from domestic raw sugar
10:24:15 8 producers. They buy others from producers who have import
10:24:20 9 rights under NAFTA, those would be Mexican sugar producers.
10:24:24 10 And then they buy sugar from producers on the forty
10:24:28 11 countries on the world market that have rights under the
10:24:30 12 Farm Bill to import raw sugar.

10:24:34 13 Q. Will US Sugar's ability to use raw sugars milled from
10:24:40 14 its own sugarcane at Port Wentworth, allow Port Wentworth to
10:24:45 15 operate better in your view?

10:24:46 16 A. In my opinion, yes.

10:24:47 17 Q. And how so?

10:24:48 18 A. It will give us a known secured base of raw materials
10:24:51 19 but then you can be a little more opportunistic on buying
10:25:00 20 the rest which means hopefully you can get it at an
10:25:02 21 advantageous price.

10:25:02 22 Q. Now assuming the transaction is allowed to close,
10:25:03 23 will the Port Wentworth facility be less dependent on
10:25:12 24 foreign raw sugar imports than it is today?

10:25:15 25 A. Somewhat.

Buker - direct

10:25:16 1 Q. And does US Sugar increase capacity utilization
10:25:22 2 though Imperial?

10:25:22 3 A. Yes.

10:25:23 4 Q. How so?

10:25:24 5 A. Well, we did it at Clewiston, we had a 1931 old
10:25:31 6 facility and we renovated it and got through putting it up,
10:25:37 7 we would apply the same people and the same processes there.

10:25:41 8 Q. Now, how much refined sugar does US Sugar plan to
10:25:45 9 produce at the Port Wentworth facility?

10:25:48 10 A. 17-and-a-half million hundredweight.

10:25:51 11 Q. And does US Sugar currently produce enough sugarcane
10:25:56 12 so that it could provide all the raw sugar needed to supply
10:26:01 13 the Port Wentworth facility?

10:26:03 14 A. No.

10:26:04 15 Q. Where will US Sugar cane get the additional raw sugar
10:26:08 16 it will require to run the Port Wentworth facility at the
10:26:11 17 expected production level?

10:26:13 18 A. The same places that Imperial does now, from other
10:26:19 19 raw producers in the U.S., from those that import under
10:26:22 20 NAFTA which again will be primarily Mexican sugar factors
10:26:26 21 and then from other foreign sugar factors in those foreign
10:26:30 22 countries that have the USDA rights to import.

10:26:32 23 THE COURT: You said that you plan to produce
10:26:36 24 seven-and-a-half million hundredweight there, right?

10:26:42 25 THE WITNESS: 17-and-a-half.

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10:26:45 1 THE COURT: 17-and-a-half hundredweight. Do you
10:26:48 2 know how much they currently produce?

10:26:50 3 THE WITNESS: At a peak, but I'm talking
10:26:52 4 something very different. I'm talking steady state, I think
10:26:55 5 if they had a great year, they would do fifteen. But we're
10:26:59 6 all so highly fixed cost, that's a huge increase,
10:27:03 7 economically.

10:27:06 8 THE COURT: And you're saying you want to do it
10:27:08 9 steadily year after year whereas they're up and down?

10:27:12 10 THE WITNESS: That is correct.

10:27:14 11 Q. Now, is the USDA involved in determining the amount
10:27:17 12 of raw sugar that may be imported into the United States?

10:27:21 13 A. Yes.

10:27:21 14 Q. And does US Sugar advocate for whether the USDA
10:27:24 15 should take actions regarding sugar imports?

10:27:32 16 A. Yes.

10:27:31 17 Q. Why does you mean US Sugar advocate before the USDA
10:27:34 18 regarding imports?

10:27:34 19 A. Because the amount of imports vary directly changes
10:27:42 20 the price of sugar.

10:27:42 21 Q. If US Sugar acquires the Port Wentworth facility,
10:27:52 22 will US Sugar continue to advocate for additional imports of
10:27:52 23 raw sugar?

10:27:52 24 A. Yes.

10:27:52 25 Q. Why?

Buker - direct

10:27:58 1 A. Because we need to supply the Port Wentworth
10:28:03 2 facility. And it needs to run at full capacity.

10:28:06 3 Q. If the USDA increases the amount of raw sugar that
10:28:10 4 may be imported, will that increase the supply of raw sugar
10:28:15 5 that's available to the full market?

10:28:17 6 A. Yes.

10:28:18 7 Q. Now, do you know what United's other members think
10:28:23 8 about US Sugar's advocacy in favor of more foreign imports?

10:28:29 9 A. They don't like it.

10:28:30 10 Q. And why is that?

10:28:31 11 A. Because it lowers the price.

10:28:32 12 Q. Would you say that this is an example of how your
10:28:41 13 incentives may not match up with the incentives of the other
10:28:44 14 United members?

10:28:47 15 A. That is correct.

10:28:49 16 Q. Now, Mr. Buker, the government contends that US
10:28:53 17 Sugar's acquisition of Imperial is going to lead to higher
10:28:56 18 prices for customers in an area that they've defined as the
10:29:00 19 southeast. What's your response to that?

10:29:01 20 A. Respectfully, I don't think they understand the sugar
10:29:02 21 market.

10:29:02 22 Q. Why do you say that?

10:29:07 23 A. Well, when we increase the throughput and it will
10:29:15 24 lower prices. I mean, just more supply always lowers
10:29:19 25 prices. And since that, you know, our factory and

Buker - cross

10:29:26 1 Imperial's factory are south of the Mason Dixon Line it
10:29:30 2 first lowers it in that area but then it will be everywhere.

10:29:33 3 Q. And why do you say it will be everywhere?

10:29:36 4 A. We sell everywhere.

10:29:38 5 Q. And by we, you mean United sells everywhere?

10:29:41 6 A. Yes, I mean United and it's more supply in the market
10:29:44 7 and the market looks at this nationally, the buyers and
10:29:47 8 everyone else.

10:29:49 9 MR. BUTERMAN: Thank you. I have no further
10:29:51 10 questions.

10:29:51 11 THE COURT: Thank you. Cross-exam.

10:29:57 12 MR. NIERLICH: Your Honor, good morning. George
10:29:59 13 Nierlich for the United States. May I proceed?

10:30:01 14 THE COURT: Please.

10:30:01 15 CROSS-EXAMINATION

10:30:01 16 BY MR. NIERLICH:

10:30:02 17 Q. Mr. Buker, good to see you again. Good morning.

10:30:04 18 A. Good morning.

10:30:04 19 Q. Before we begin, thank you for your service. I also
10:30:09 20 wanted to check, did you receive a binder from us?

10:30:12 21 A. I don't think so.

10:30:14 22 MR. NIERLICH: Your Honor, may I approach to
10:30:17 23 provide the binder?

10:30:32 24 Q. Mr. Buker, you have been a member of the United
10:30:35 25 Sugars board of directors since 2005, right?

Buker - cross

10:30:39 1 A. Yes.

10:30:39 2 Q. You're also a member of the executive committee of
10:30:43 3 United Sugars, right?

10:30:44 4 A. Yes.

10:30:45 5 Q. United, not US Sugar, makes the arrangements to
10:30:49 6 transport US Sugar's granulated sugar to customers, right?

10:30:54 7 A. Correct.

10:30:54 8 Q. Customers provide the specifications for granulated
10:30:59 9 sugars to United, not to US Sugar, correct?

10:31:01 10 A. Correct.

10:31:03 11 Q. I want to turn briefly to your role in negotiations
10:31:06 12 to acquire Imperial. Mr. Buker, United negotiated
10:31:11 13 unsuccessfully to buy Imperial before US Sugar began
10:31:15 14 negotiating with Imperial; is that right?

10:31:16 15 A. That is correct.

10:31:18 16 Q. You participated in United's negotiations with
10:31:22 17 Imperial, right?

10:31:23 18 A. That is correct.

10:31:24 19 Q. As one of the four CEOs of the United member firm,
10:31:28 20 you were responsible for oversight of the negotiations on
10:31:32 21 behalf of United, right?

10:31:33 22 A. Right.

10:31:34 23 Q. Ultimately United didn't go forward with an
10:31:37 24 acquisition of Imperial because the gap between what United
10:31:40 25 offered and Imperial demanded was just too big, right?

Buker - cross

10:31:44 1

A. Yes.

10:31:44 2

Q. After United discontinued negotiations, you led

10:31:48 3

negotiations with Imperial on behalf of US Sugar, right?

10:31:51 4

A. Yes.

10:31:52 5

Q. But you also provided updates concerning US Sugar's

10:31:57 6

negotiations with Imperial to the United executive

10:32:00 7

committee, right?

10:32:01 8

A. Yes.

10:32:02 9

Q. Mr. Buker, if you could turn in your binder to the

10:32:04 10

tab marked PTX 494. Mr. Buker, these are the minutes of the

10:32:25 11

executive committee's meeting?

10:32:25 12

A. Yes.

10:32:25 13

Q. And you attended this meeting?

10:32:28 14

A. Yes.

10:32:30 15

MR. NIERLICH: Plaintiff requests to admit PTX

10:32:31 16

494 into evidence.

10:32:34 17

MR. BUTERMAN: No objection, Your Honor.

10:32:35 18

THE COURT: It's admitted.

10:32:35 19

(PTX Exhibit No. 494 was admitted into

10:32:35 20

evidence.)

10:32:35 21

BY MR. NIERLICH:

10:32:37 22

Q. Mr. Buker, if you could please turn to page 3.

10:32:40 23

A. All right.

10:32:42 24

Q. You provided an update on Project Seine 2.0 to other

10:32:42 25

members of the United executive committee, is that right?

Buker - cross

10:32:54 1 A. Yes.

10:32:55 2 Q. And Project Seine 2.0 refers to US Sugar's effort to
10:33:00 3 acquire Imperial; right?

10:33:02 4 A. Yes.

10:33:03 5 Q. And you provided this update during a recess?

10:33:06 6 A. Yes.

10:33:07 7 Q. Set that aside, Mr. Buker. Let's turn to a few
10:33:11 8 documents you signed. Can you turn to the tab PTX 304.

10:33:25 9 A. All right.

10:33:26 10 Q. Sir, is plaintiffs Exhibit 304 the Asset Purchase
10:33:30 11 Agreement by which US Sugar would acquire Imperial?

10:33:31 12 A. Yes.

10:33:31 13 Q. Did you sign this document? Refer to page 117 if you
10:33:40 14 would like to confirm that?

10:33:41 15 A. Thank you. Yes.

10:33:47 16 MR. NIERLICH: Plaintiff request to admit PTX
10:33:50 17 304 into evidence, Your Honor.

10:33:51 18 MR. BUTERMAN: No objection.

10:33:53 19 THE COURT: It's admitted.

10:33:53 20 (PTX Exhibit No. 304 was admitted into
10:33:54 21 evidence.)

10:33:54 22 BY MR. NIERLICH:

10:33:55 23 Q. Mr. Buker, please turn to the tab JTX 040.

10:34:00 24 A. All right.

10:34:02 25 Q. Mr. Buker, is JTX 040 the amended and restated

Buker - cross

10:34:12 1 uniformed member sugar marketing agreement between United
10:34:16 2 Sugars and U.S. Sugar Corporation dated September 20, 2007?

10:34:21 3 A. Yes.

10:34:21 4 Q. Did you sign this document? Refer to page 16 if you
10:34:26 5 would like to confirm.

10:34:27 6 A. All right. Yes.

10:34:33 7 MR. NIERLICH: Your Honor, plaintiff request to
10:34:35 8 admit JTX 040 into evidence.

10:34:38 9 MR. BUTERMAN: No objection.

10:34:39 10 THE COURT: It's admitted.

10:34:40 11 (JTX Exhibit No. 040 was admitted into
10:34:41 12 evidence.)

10:34:41 13 BY MR. NIERLICH:

10:34:42 14 Q. Mr. Buker, please turn to the next tab, 041.

10:34:46 15 A. All right.

10:34:46 16 Q. Is this document an April 20th, 2021, amendment to
10:34:50 17 the marketing agreement between US Sugar and United, the
10:34:54 18 document we were just looking at JTX 040?

10:34:57 19 A. Yes.

10:34:58 20 Q. Did you sign this document? Page 9?

10:35:00 21 A. Yes.

10:35:02 22 MR. NIERLICH: Your Honor, plaintiff request to
10:35:10 23 admit JTX 041 into evidence.

10:35:12 24 MR. BUTERMAN: No objection.

10:35:13 25 THE COURT: Thank you. It's admitted.

Buker - cross

10:35:14 1 (JTX Exhibit No. 041 was admitted into
10:35:16 2 evidence.)

10:35:16 3 BY MR. NIERLICH:

10:35:17 4 Q. Mr. Buker, this amendment, JTX 041, was designed to
10:35:21 5 compensate US Sugar in connection the Imperial acquisition,
10:35:26 6 is that correct?

10:35:26 7 A. Yes.

10:35:27 8 Q. Mr. Buker, you testified a few minutes ago concerning
10:35:30 9 some of the reasons for US Sugar's acquisition of Imperial
10:35:34 10 and talked a little bit about excess sugarcane, is that
10:35:38 11 right?

10:35:38 12 A. Yes.

10:35:39 13 Q. And one thing you stated was that US Sugar currently
10:35:42 14 delivers 750,000 to 1.5 million tons of excess cane to other
10:35:47 15 mills; is that correct?

10:35:48 16 A. Yes.

10:35:48 17 Q. How does that compare to the total tons of cane
10:35:53 18 produced by US Sugar and the independent farmers delivering
10:35:58 19 cane to US Sugar?

10:35:59 20 A. The cane that is delivered to US Sugar is
10:36:02 21 eight-and-a-half million tons.

10:36:07 22 Q. So it's somewhere around 10, 15 percent of the excess
10:36:12 23 cane?

10:36:12 24 A. Yeah, I would think that's reasonable.

10:36:17 25 Q. Mr. Buker, if you could please turn to the tab PTX

Buker - cross

10:36:21 1 509.

10:36:29 2 A. All right.

10:36:30 3 Q. Mr. Buker, plaintiff's Exhibit 509 is a set of
10:36:34 4 materials provided by US Sugar to the US Sugar board of
10:36:37 5 directors in June of 2021?

10:36:39 6 A. Yes.

10:36:41 7 MR. NIERLICH: Your Honor, plaintiff request to
10:36:43 8 admit plaintiffs Exhibit 509 into evidence.

10:36:46 9 MR. BUTERMAN: No objection.

10:36:41 10 THE COURT: Thank you. It's admitted.

10:36:41 11 (PTX Exhibit No. 509 was admitted into
10:36:41 12 evidence.)

10:36:41 13 BY MR. NIERLICH:

10:36:41 14 Q. Mr. Buker, please turn to slide 9 of that
10:36:51 15 Exhibit 509.

10:36:51 16 A. How do I know what page is slide 9? Slide 9 on our
10:37:01 17 numbering. Fine, I'm there.

10:37:01 18 Q. Thank you, sir.

10:37:01 19 The chart in the upper left of slide 9 of PTX
10:37:07 20 509 shows tons of cane produced by US Sugar and the
10:37:12 21 independent farmers delivering cane to US Sugar for 2018,
10:37:12 22 2019, and 2020, is that correct?

10:37:12 23 A. Yes.

10:37:12 24 Q. And it shows the portion that is excess cane versus
10:37:22 25 that which was milled at US Sugar's facility in Clewiston?

Buker - cross

10:37:26 1 A. Yes.

10:37:26 2 Q. And those figures are accurate?

10:37:28 3 A. Yes. Well, as accurate as an estimate can be.

10:37:33 4 Q. Well, we are referring to historical figures?

10:37:36 5 A. The historical figures are accurate.

10:37:37 6 Q. Thank you, sir.

10:37:38 7 US Sugar does not have any specific plans to
10:37:41 8 increase the amount of sugarcane that US Sugar grows in the
10:37:45 9 next three years, correct?

10:37:50 10 A. There will be small amounts of cane coming on to
10:37:55 11 production that we haven't yet harvesting, but there are no
10:37:59 12 major plans.

10:38:00 13 Q. And US Sugar does not have any plans to increase the
10:38:03 14 amount of sugarcane acquired from independent growers in the
10:38:07 15 next three years; is that correct?

10:38:09 16 A. That is correct.

10:38:11 17 Q. Mr. Buker, you talked a little about what happens to
10:38:15 18 that excess cane a few minutes ago. US Sugar currently
10:38:21 19 delivers sugarcane to three other mills in Florida, is that
10:38:24 20 correct?

10:38:26 21 A. That's correct.

10:38:28 22 Q. And those mills process the cane into raw sugar, is
10:38:31 23 that correct?

10:38:33 24 A. That's correct.

10:38:35 25 Q. And those mills sell the raw sugar to a refiner like

Buker - cross

10:38:31 1 **ASR?**

10:38:32 2 A. That is correct.

10:38:33 3 Q. That will change if US Sugar completes the
10:38:36 4 acquisition of Imperial, right?

10:38:37 5 A. Yes.

10:38:38 6 Q. One of the mills US Sugar sells extra cane to is
10:38:42 7 operated by the Sugar Cane Growers Cooperative, correct?

10:38:46 8 A. That's correct.

10:38:46 9 Q. And US Sugar has an ownership interest in the Sugar
10:38:51 10 Cane Growers Cooperative through US Sugar's wholly owned
10:38:54 11 subsidiary South Bay Growers, right?

10:38:57 12 A. That is correct.

10:38:58 13 Q. Sir, if you could turn to tab DTX 514, please.

10:39:16 14 A. All right.

10:39:18 15 Q. Defendant Exhibit 514 is an agreement between U.S.
10:39:22 16 Sugars wholly owned subsidiary South Bay Growers and the
10:39:25 17 Sugarcane Growers Cooperative, right?

10:39:28 18 A. Yes.

10:39:28 19 Q. Is this the agreement with the Sugarcane Growers
10:39:32 20 Cooperative that you were describing a few minutes ago?

10:39:34 21 A. Let me look a minute.

10:39:40 22 Yes.

10:39:42 23 Q. This agreement provides certain rights to US Sugar to
10:39:44 24 acquire raw sugar from the mill operated by SCGC, right?

10:39:45 25 A. Yes.

Buker - cross

10:39:51 1 MR. NIERLICH: Your Honor, plaintiff request to
10:39:53 2 admit exhibit DTX 514 into evidence.

10:39:56 3 MR. BUTERMAN: No objection.

10:39:57 4 THE COURT: Thank you. It's admitted.

10:39:57 5 (DTX Exhibit No. 514 was admitted into
10:39:59 6 evidence.)

10:39:59 7 BY MR. NIERLICH:

10:39:59 8 Q. Mr. Buker, the raw sugar from Sugar Cane Growers
10:39:59 9 Cooperative won't be sufficient to fully supply the Savannah
10:40:04 10 refinery in the event this transaction is completed,
10:40:06 11 correct?

10:40:07 12 A. That is correct.

10:40:07 13 Q. So even if US Sugar acquires the Savannah refinery,
10:40:13 14 that refinery would still need to import raw sugar, right?

10:40:13 15 A. Correct.

10:40:14 16 Q. US Sugar signed the Asset Purchase Agreement to
10:40:19 17 acquire Imperial's Savannah refinery in March 2021, right?

10:40:23 18 A. Yes.

10:40:23 19 Q. You wrote to the Secretary of Agriculture the next
10:40:29 20 month to state that US Sugar will support raw sugar imports,
10:40:30 21 right?

10:40:30 22 A. Yes.

10:40:32 23 Q. Sir, if you could turn to exhibit PTX 229.

10:40:40 24 A. All right.

10:40:42 25 Q. Mr. Buker, are the second and third pages of

Buker - cross

10:40:44 1 plaintiff's Exhibit 229 a letter that you sent to the
10:40:47 2 Secretary of Agriculture dated April 27th, 2021?

10:40:52 3 A. Yes.

10:40:54 4 MR. NIERLICH: Your Honor, plaintiff request to
10:40:56 5 admit Plaintiff Exhibit 229 into evidence.

10:40:58 6 MR. BUTERMAN: No objection.

10:40:58 7 THE COURT: Thank you. It's admitted.

10:40:58 8 (PTX Exhibit No. 229 was admitted into
10:41:00 9 evidence.)

10:41:00 10 BY MR. NIERLICH:

10:41:01 11 Q. Mr. Buker, if you could turn to the second page of
10:41:03 12 that document which is the first page of your letter, and
10:41:05 13 the second paragraph. Is it correct that you wrote the
10:41:12 14 following sentence to the Secretary of Agriculture: "In
10:41:14 15 addition, going forward, US Sugar will continue to support
10:41:21 16 robust raw sugar imports because it will need large amounts
10:41:25 17 of imported raw sugar to operate the Port Wentworth facility
10:41:29 18 like Imperial Sugar does today."

10:41:32 19 A. Yes.

10:41:34 20 Q. Mr. Buker, was that the first time that you had
10:41:36 21 advocated for more raw sugar imports?

10:41:38 22 A. To the best of my recollection.

10:41:42 23 Q. Mr. Buker, you testified briefly concerning increases
10:41:46 24 to Imperial's production or the production at the Port
10:41:50 25 Wentworth refinery. Would you agree with me that you are

Buker - cross

10:41:53 1 not qualified to analyze the conditions of the equipment at
10:41:57 2 Imperial's Port Wentworth facility?

10:42:05 3 A. Not entirely, no.

10:42:10 4 Q. What do you mean by that, sir?

10:42:13 5 A. Well, I am not qualified to make a precise
10:42:18 6 estimation, I'm experienced enough to know what general
10:42:22 7 condition of a sugar factory is.

10:42:25 8 Q. Sir, do you recall having your deposition taken about
10:42:33 9 two months ago?

10:42:34 10 A. Yes.

10:42:34 11 Q. Can you turn to the last tab in your binder,
10:42:40 12 page 187, please?

10:42:40 13 A. Yes. What page do you want me at.

10:42:49 14 Q. 187, starting at the very bottom, line 25.

10:43:00 15 A. All right.

10:43:01 16 Q. Sir, do you see I asked you starting at 187:25, I
10:43:05 17 asked you the question, overall how would you compare the
10:43:08 18 condition of equipment at Imperial's Port Wentworth facility
10:43:11 19 with the condition of equipment at US Sugar's Clewiston
10:43:15 20 refinery. You answered, I would not. I then asked you, you
10:43:20 21 would not compare them. And you responded, I'm not
10:43:22 22 qualified. Do you see that, sir?

10:43:24 23 A. That's true, I didn't compare them to US Sugar. But
10:43:29 24 if you ask me like you just did, can you tell me what the
10:43:32 25 conditions are, I would say precisely no, but I can tell you

Buker - cross

10:43:38 1 from general conditions.

10:43:40 2 Q. Sir, US Sugar hasn't committed to any specific plans
10:43:44 3 for the Port Wentworth facility if the transaction closes,
10:43:48 4 correct?

10:43:48 5 A. That is correct.

10:43:49 6 Q. Sir, is Elaine Wood, US Sugar's CFO, in charge of the
10:43:58 7 financial analysis of U.S. Sugar's acquisition of Imperial?

10:44:02 8 A. Yes.

10:44:02 9 Q. Including any synergy analysis performed by US Sugar?

10:44:06 10 A. Yes.

10:44:10 11 Q. Mr. Buker, you're generally familiar with the USDA
10:44:14 12 sugar program, right?

10:44:15 13 A. Yes.

10:44:15 14 Q. You also describe it as the Farm Bill earlier?

10:44:18 15 A. Yes.

10:44:19 16 Q. Does the USDA directly set any prices for domestic
10:44:25 17 raw sugar?

10:44:25 18 A. No.

10:44:26 19 Q. Does the USDA directly set any prices for imported
10:44:31 20 raw sugar?

10:44:31 21 A. No.

10:44:32 22 Q. Does the USDA control the port of entry for imported
10:44:37 23 raw sugar?

10:44:38 24 A. No.

10:44:39 25 Q. Does the USDA directly set the prices at which

Gorrell - direct

10:44:43 1 refined sugar is sold?

10:44:45 2 A. No.

10:44:48 3 MR. NIERLICH: Thank you, Mr. Buker. Nothing
10:44:51 4 further.

10:44:51 5 MR. BUTERMAN: No redirect, Your Honor.

10:44:53 6 THE COURT: Thank you, sir. You are excused.

10:44:54 7 This is a good time for us to take our morning break.

10:44:58 8 (A brief recess was taken.)

11:02:53 9 THE COURT: All right. Everyone, please be
11:02:56 10 seated.

11:02:57 11 What's next?

11:02:58 12 MR. CAMERON: Good morning, Your Honor. With
11:03:00 13 Your Honor's permission, defendants call Michael Gorrell to
11:03:08 14 the stand.

11:03:09 15 THE COURT: His position?

11:03:11 16 MR. CAMERON: Mr. Gorrell is the president and
11:03:13 17 CEO of Imperial Sugar.

11:03:21 18 COURT CLERK: Please raise your right hand.
11:03:24 19 Please state and spell your full name for the record.

11:03:26 20 THE WITNESS: Michael Gorrell. M-I-C-H-A-E-L,
11:03:32 21 G-O-R-R-E-L-L.

11:03:42 22 MR. CAMERON: Your Honor, may I proceed?

11:03:42 23 THE COURT: Please.

11:03:47 24 DIRECT EXAMINATION

11:03:47 25 BY MR. CAMERON:

Gorrell - direct

11:03:47 1 Q. Good morning, Mr. Gorrell.

11:03:49 2 A. Good morning.

11:03:50 3 Q. Where are you currently employed?

11:03:52 4 A. I'm employed at Louis Dreyfus Company.

11:03:54 5 Q. What is your current job title?

11:03:55 6 A. I am president and CEO of Imperial Sugar Company.

11:03:59 7 Q. What, if anything, is the relationship between

11:04:01 8 Imperial Sugar and the Louis Dreyfus Company?

11:04:03 9 A. Imperial Sugar Company is a wholly owned subsidiary

11:04:07 10 of Louis Dreyfus.

11:04:08 11 Q. How long have you been the president and CEO of

11:04:11 12 Imperial Sugar?

11:04:12 13 A. Since about August 2012.

11:04:14 14 Q. How long have you worked in the sugar industry?

11:04:16 15 A. For about twenty-six years.

11:04:18 16 Q. Mr. Gorrell, what does the Imperial Sugar Company do?

11:04:21 17 A. So we refine cane raw sugar at our sugar refinery in

11:04:27 18 Port Wentworth, Georgia, and we market sugar and molasses

11:04:31 19 throughout the United States.

11:04:31 20 Q. You mentioned the refinery in Port Wentworth. Does

11:04:32 21 Imperial have any other facilities, sir?

11:04:37 22 A. We have a bulk transfer liquid melt station in

11:04:42 23 Ludlow, Kentucky outside of Cincinnati. We also have an

11:04:45 24 administrative office in Sugarland, Texas.

11:04:47 25 Q. From where does Imperial gets it raw cane sugar that

Gorrell - direct

11:04:51 1 it refines at the Port Wentworth refinery?

11:04:53 2 A. Well, Imperial, we don't grow any sugarcane ourselves
11:04:56 3 nor do we process sugarcane into raw sugar, so generally
11:05:00 4 over 90 percent of the sugar that we get we have to import.

11:05:04 5 Q. Does the Port Wentworth refinery generally run at
11:05:09 6 full capacity each year?

11:05:11 7 A. No. On average we run about 75 percent capacity but
11:05:15 8 there are some years where we run only 60 to 65 percent.

11:05:18 9 Q. Can you describe the types of refined sugar products
11:05:21 10 that Imperial sells?

11:05:21 11 A. We have the standard refined EFG products everybody
11:05:24 12 has been talking about. We also make brown sugar, powdered
11:05:27 13 sugar, liquid sugar, and some specialty products.

11:05:30 14 Q. And just to remind everybody what does EFG stand for?

11:05:33 15 A. Extra fine granulated.

11:05:36 16 Q. How would you describe the state of the facilities at
11:05:40 17 the Port Wentworth refinery?

11:05:43 18 A. It really depends on which part of the refinery you
11:05:46 19 look at. We're still operating some equipment from the
11:05:49 20 1940's, there is some other very old equipment in the
11:05:52 21 refinery. Unfortunately in 2008 there was a terrible
11:05:55 22 accident that occurred at the refinery, and after that
11:05:58 23 accident the company used the insurance money to rebuild
11:06:01 24 some parts of the refinery.

11:06:04 25 Q. Aside from the parts of the refinery that were

Gorrell - direct

11:06:07 1 rebuilt after the accident that you referred to, why hasn't
11:06:11 2 Imperial upgraded the parts of the facility that you
11:06:15 3 described as very old?

11:06:16 4 A. Look, if you go back, the company has been in
11:06:20 5 financial difficulty, it went bankrupt in 2001. To be
11:06:24 6 honest, the job of multiple CEOs over that period was to
11:06:29 7 sell assets, close assets. After the accident, the focus
11:06:34 8 was on rebuilding obviously, and then almost immediately it
11:06:37 9 went up for sale again. And then not long after Louis
11:06:42 10 Dreyfus acquired Imperial we went through some regulatory
11:06:45 11 changes which made the outlook very uncertain for us.

11:06:51 12 Q. So what is Louis Dreyfus' or Imperial's current
11:06:54 13 approach to capital expenditures at the Imperial Sugar
11:06:54 14 Company?

11:07:00 15 A. We really just focus on maintenance and what I call
11:07:03 16 stay in business sort of cap ex, in addition to safety,
11:07:06 17 health, environmental, ones with a strong focus on making
11:07:10 18 sure the refinery is safe to operate.

11:07:12 19 Q. Is safety, health and environmental sometimes called
11:07:17 20 SHE for short?

11:07:17 21 A. Yes.

11:07:17 22 Q. And why is it that LDC and Imperial has decided to
11:07:22 23 limit capital expenditures at the Port Wentworth refinery to
11:07:25 24 maintenance plus safety, health and environmental?

11:07:25 25 A. As I mentioned, there were some regulatory changes

Gorrell - direct

11:07:31 1 that occurred in 2015, and we're in a situation where we are
11:07:35 2 a very high cost producer, our raw sugar costs are very
11:07:40 3 high, our raw sugar costs in any given year make up 70 to
11:07:45 4 80 percent of our total costs. Due to this, we have such an
11:07:49 5 uncertain future, LDC has been trying to sell this business
11:07:55 6 for over five years now. That's more than half the time
11:07:58 7 that we have owned it.

11:07:59 8 Q. Does that situation have any relationship to whether
11:08:01 9 or not it makes sense to invest more money into the business
11:08:04 10 at the present?

11:08:04 11 A. That's sort of the environment, and it's logical,
11:08:07 12 we're going to do what we can to keep the business open from
11:08:10 13 one year to the next and make sure it's safe for the
11:08:13 14 employees, but it doesn't make a lot of sense to do more
11:08:15 15 than that.

11:08:15 16 Q. Mr. Gorrell, you mentioned regulatory changes. Can
11:08:19 17 you describe any regulations that impact Imperial's
11:08:22 18 business?

11:08:22 19 A. There are quite a lot of regulations around the US
11:08:26 20 Sugar market, but the big ones are the one that affect our
11:08:29 21 raw sugar supply.

11:08:31 22 Q. And what are the regulations that affect your raw
11:08:34 23 sugar supply?

11:08:34 24 A. So on one hand you have the US Sugar Program which is
11:08:38 25 managed by the USDA. On the other hand, you have the U.S.

Gorrell - direct

11:08:43 1 Mexico sugar suspension agreements which are managed by the
11:08:47 2 Department of Commerce, but in very close consultation with
11:08:50 3 USDA.

11:08:52 4 Q. What is the US Sugar Program that you just mentioned?

11:08:55 5 A. US Sugar Program is a whole host of regulations. I
11:08:59 6 think we saw before there is dual mandate, where the primary
11:09:05 7 mandate is that the U.S. government needs to provide price
11:09:08 8 support for the domestic processors of sugarcane and sugar
11:09:12 9 beets in the United States. And they do that by granting
11:09:15 10 nonrecourse loans and managing the marketplace in such a way
11:09:21 11 that you don't get oversupplied and threaten default against
11:09:27 12 those loans. The second mandate is very clear, it's to
11:09:31 13 ensure an adequate supply of raw and refined sugar in the
11:09:34 14 United States.

11:09:34 15 Q. How does the USDA accomplish those two mandates you
11:09:38 16 just described?

11:09:38 17 A. On the domestic processor front, what it does is
11:09:42 18 issue marketing allocation, the tradeoff is for those
11:09:46 19 non-recourse loans, which provides caps on how much the
11:09:49 20 domestic processors are allowed to sell, generally that can
11:09:52 21 be no lower than minimum 85 percent of the domestic market
11:09:55 22 price.

11:09:57 23 On the import side, the USDA very closely
11:10:00 24 manages the availability of low tier duty or zero duty sugar
11:10:02 25 that can come into the marketplace, anything that comes in

Gorrell - direct

11:10:09 1 above that is subject to the high-tier duty which is very
11:10:13 2 significant costs.

11:10:16 3 Q. So what impact, if any, does the US Sugar Program
11:10:20 4 have on Imperial?

11:10:21 5 A. It's two big things. Number one, raw sugar is 70 to
11:10:26 6 80 percent of our cost base and it makes our cost of raw
11:10:30 7 sugar very, very high relative to the rest of the industry.
11:10:33 8 The other thing that it does is it puts constraints on the
11:10:38 9 amount of imports, generally our average is about 75 percent
11:10:42 10 of capacity, so we can't fully dilute our fixed costs.

11:10:49 11 Q. How, if at all, does the situation that you just
11:10:52 12 described impact Imperial's ability to compete?

11:10:56 13 A. The reality is that the domestic, you know, the
11:11:01 14 domestic producers have an enormous head start on us on
11:11:06 15 price. It's super clear, we can't compete on price with
11:11:11 16 this group of entities.

11:11:12 17 Q. Now, I would like to show you a document which is in
11:11:15 18 the binder in front of you for the defendants, and it's a
11:11:18 19 document marked Defendants Trial Exhibit 219. Can you find
11:11:22 20 that in the binder, sir?

11:11:26 21 A. Yes, I have it here.

11:11:27 22 Q. Can you describe this document, please, for the
11:11:30 23 Court?

11:11:30 24 A. So, this is an internal e-mail and it's got a
11:11:34 25 PowerPoint attached to it.

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11:11:35 1 Q. What are the dates of the document?

11:11:37 2 A. The e-mail is June 4th, 2019, and the PowerPoint is
11:11:41 3 May of 2019.

11:11:43 4 Q. And did you participate in the creation of the
11:11:46 5 PowerPoint that's attached to this e-mail?

11:11:47 6 A. Yes, I did.

11:11:49 7 MR. CAMERON: Your Honor, I would like to move
11:11:51 8 Defendants Trial Exhibit 219 into evidence. I understand
11:11:54 9 there are no objections.

11:11:55 10 MS. GARRETT: No objection.

11:11:56 11 THE COURT: Thank you. It's admitted.

11:11:56 12 (DTX Exhibit No. 219 was admitted into
11:11:56 13 evidence.)

11:11:56 14 BY MR. CAMERON:

11:11:59 15 Q. So Mr. Gorrell, I would like to direct your attention
11:12:01 16 to slide 9 of the PowerPoint that's attached to the e-mail.
11:12:04 17 And it should come up on your screen in front of you.

11:12:07 18 Do you see that?

11:12:08 19 A. Can you still hear me?

11:12:10 20 Q. Yes, I can hear you just fine.

11:12:12 21 A. Sorry.

11:12:13 22 Q. All right. Are you there?

11:12:14 23 A. Yes.

11:12:15 24 Q. Okay. Sir, so if you see this slide, at the top
11:12:15 25 there is a reference to an import-based, price uncompetitive

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11:12:25 1 sugar refinery, do you see that?

11:12:26 2 A. Yes, I see that.

11:12:28 3 Q. Is that a reference to Imperial?

11:12:30 4 A. Yes.

11:12:30 5 Q. When was that statement made?

11:12:32 6 A. In May of 2019.

11:12:34 7 Q. Would you still apply that description to Imperial
11:12:39 8 today?

11:12:39 9 A. Yes. If anything, I would call it -- it's an import
11:12:43 10 based even more price uncompetitive sugar refinery.

11:12:46 11 Q. I would also like to ask you about some of the
11:12:49 12 numbers on this slide. What do the numbers on this slide
11:12:52 13 represent?

11:12:52 14 A. The point on this slide as I was trying to show the
11:12:56 15 cost base that we confront versus the domestic producers,
11:13:00 16 and in turn, the minimum prices at which we can afford to
11:13:05 17 sell our sugar versus where they can sell theirs.

11:13:07 18 Q. Where are the minimums that are referenced in the
11:13:10 19 document come from, sir?

11:13:11 20 A. So for the domestic producers, that comes off of the
11:13:15 21 US Sugar Program when the USDA publishes those loan rates
11:13:20 22 for those nonrecourse loans. In our case it was the price
11:13:23 23 we were paying at the time for raw sugar and adding our
11:13:24 24 processing cost to that.

11:13:25 25 Q. The information you used here for domestic cane and

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11:13:32 1 beet growers you said was published by the USDA, is that
11:13:36 2 information public?

11:13:36 3 A. Yes, it is.

11:13:37 4 Q. Based on these numbers, how did Imperial's minimum
11:13:40 5 price compare to that of domestic cane and beet refiners in
11:13:45 6 2019?

11:13:46 7 A. You can see at the time they were between 7 and \$0.09
11:13:50 8 a pound more expensive than they were.

11:13:53 9 Q. Have those numbers changed at all since 2019?

11:13:54 10 A. Yes, they have changed significantly. If you look at
11:13:58 11 the raw sugar costs in there, we have baked in there \$0.26,
11:14:04 12 \$0.27 per pound for raw sugar. Today, the prices are
11:14:07 13 between 36 and \$0.37 a pound. We have lost \$0.10 a pound of
11:14:13 14 additional competitiveness against these guys, so it's 17 to
11:14:17 15 \$0.19 per pound.

11:14:18 16 Q. Through this document you refer to a minimum FOB
11:14:22 17 selling price. What do you mean by that?

11:14:24 18 A. FOB is our trade term for free on board, sugar at
11:14:29 19 factory before transportation.

11:14:31 20 Q. What happens to the price difference between Imperial
11:14:34 21 and the domestic cane and beet producers once you add in
11:14:36 22 freight?

11:14:38 23 A. It depends on where you're shipping it from in the
11:14:41 24 end, but big picture across the U.S. is that the differences
11:14:44 25 that we may have on freight versus them to get to the

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11:14:47 1 customers are negligible compared to the price or the cost
11:14:52 2 difference that we have confronting our businesses to get it
11:14:54 3 to FOB stage.

11:14:56 4 Q. Sir, you mentioned in your testimony that it's
11:14:59 5 difficult for Imperial to compete. So who else sells
11:15:02 6 refined sugar in the United States?

11:15:04 7 A. So I would like to bucket it into the different
11:15:09 8 groups. You have got the vertically integrated cane sugar
11:15:13 9 refiners, you got the domestic beet processors, you got the
11:15:17 10 import based refiners like Imperial, you got liquid sugar
11:15:21 11 refiners, you have foreign, or U.S. affiliates of foreign
11:15:24 12 exporters, you got international trade houses, and you got
11:15:31 13 distributors of all sorts of shape and sizes around the
11:15:35 14 United States.

11:15:35 15 Q. Would importers be included on that list?

11:15:37 16 A. Yeah, quite a few of those people do import sugar.

11:15:41 17 Q. Do all the types of companies that you just described
11:15:44 18 sell sugar into the southeast quadrant of the country?

11:15:48 19 A. Yes, they do.

11:15:49 20 Q. Then if you take into account all of the categories
11:15:52 21 you just mentioned, approximately in your view, sir, how
11:15:53 22 many entities sell refined sugar in the United States and
11:15:57 23 compete with Imperial?

11:15:58 24 A. And compete with Imperial? 35 to 45.

11:16:02 25 Q. So let me ask you just a little bit more about some

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11:16:05 1 of those categories. You mentioned vertically integrated
11:16:08 2 cane refiners. Could you provide some examples?

11:16:11 3 A. Sure. You got Florida Crystal. You have US Sugar.
11:16:15 4 You have Louisiana Sugar Refining. More recently you have
11:16:19 5 Zucramex. Zucramex a Mexican milling group that processes
11:16:24 6 sugar cane into raw sugar and they decided to build a sugar
11:16:28 7 refinery in San Diego.

11:16:30 8 Q. In your view and based on your experience, sir, is
11:16:34 9 Imperial cost competitive against vertically integrated cane
11:16:37 10 refiners?

11:16:37 11 A. No, we are not even close.

11:16:39 12 Q. Why is that?

11:16:39 13 A. As I explained, our input costs are significantly
11:16:42 14 higher than theirs are, in addition to that they have the
11:16:45 15 luxury of being able to plan to run their refining capacity
11:16:49 16 at a hundred percent capacity whereas the constraints on our
11:16:52 17 business are such that we only average 75 percent.

11:16:55 18 Q. You mentioned beet processors. Again, in your view
11:16:58 19 and based on your experience, sir, is Imperial cost
11:17:02 20 competitive against beet processors?

11:17:04 21 A. No.

11:17:04 22 Q. You also mentioned liquid refiners. Could you
11:17:08 23 explain, what is a liquid refiner?

11:17:10 24 A. So a liquid refiner is somebody who brings in raw
11:17:13 25 sugar and instead of taking it all the way to the dry stage

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11:17:18 1 like we do, they stop at that the liquid stage.

11:17:21 2 Q. Does Imperial also sell liquid sugar?

11:17:24 3 A. Yes, we do.

11:17:25 4 Q. Could you provide some examples of liquid refiners in
11:17:28 5 the US today?

11:17:29 6 A. CSC Sugar, with a number of facilities around the US,
11:17:33 7 you have Sugar Services doing it now, D&I Sweeteners,
11:17:38 8 Manlake, L&S Sweeteners, Sucro Sourcing.

11:17:42 9 Q. In your view and based on your experience, do liquid
11:17:45 10 refiners have any competitive advantage?

11:17:48 11 A. Yes, it means generally smaller units that get set up
11:17:52 12 very close to the target customers so they have quite a
11:17:55 13 transportation advantage over us, but also because of the
11:17:58 14 profile of how they get set up, they run on lower fixed cost
11:18:03 15 than we do.

11:18:04 16 Q. Has Imperial ever lost business to a liquid refiner?

11:18:07 17 A. Yes.

11:18:07 18 Q. Has it lost business to CSC?

11:18:10 19 A. Yes.

11:18:10 20 Q. Could you give an example?

11:18:12 21 A. Yeah. If you go back, we used to sell a lot of
11:18:15 22 liquid sugar in the Memphis area to customers like Unilever,
11:18:18 23 Kellogg's, et cetera, frankly we haven't sold to these guys
11:18:22 24 in years, CSC has -- with Sugar Services.

11:18:25 25 Q. You mentioned importers, could you explain what you

Gorrell - direct

11:18:30 1 mean by importers in this context?

11:18:33 2 A. Well, look, across the valley there are a lot of
11:18:38 3 different people importing sugar in the U.S., you got the,
11:18:41 4 as I said, the US subsidiary of foreign exporters, people
11:18:45 5 like, Pantaleon Commodities or Zucramex USA, you got
11:18:51 6 international trade houses like Wilmar, Czarnikow, ED&F Man,
11:18:58 7 you have got distributors, whole host of distributors around
11:19:03 8 that do that, and then you also -- you go to the other end
11:19:06 9 of the spectrum, we have even seen Michigan Sugar importing
11:19:11 10 refined sugar in the last couple of years.

11:19:13 11 Q. Sir, in your view and based on your experience do
11:19:16 12 importers have any competitive advantages over Imperial?

11:19:19 13 A. Yeah. Look, they're accessing low cost supply
11:19:23 14 directly from the origin. The last couple of years we have
11:19:27 15 seen a million to a million-and-a-half tons of imported
11:19:30 16 refined sugar coming to this country. It's right there in
11:19:33 17 the USDA statistics. It's low cost because it benefits
11:19:36 18 these zero or duty or low tier quotas, but also they can
11:19:40 19 bring it in all over the country.

11:19:43 20 Q. You mentioned distributors. Could you provide some
11:19:46 21 examples of distributors who in your view compete with
11:19:50 22 Imperial?

11:19:53 23 A. Sure. I mean, you have Indiana Sugar, you have
11:19:56 24 Batory Foods, you have Evergreen Sweeteners, St. Charles
11:20:00 25 Trading, ICI Foods, Atlantic Ingredients, ADM, Archer

Gorrell - direct

11:20:10 1 Daniels Midland, Cedar Lake Products, Blackhive.

11:20:13 2 Q. Is Evergreen a distributor, sir?

11:20:15 3 A. Yeah, I think I mentioned Evergreen, too.

11:20:18 4 Q. How is it possible that distributors are able to
11:20:21 5 compete with Imperial?

11:20:23 6 A. Well, look, if you look at their toolbox they have
11:20:26 7 got quite a lot in their toolbox. To start with, instead of
11:20:30 8 just marketing sugar out of your refinery with the higher
11:20:34 9 cost base, et cetera, they're able to access domestic beet
11:20:38 10 processors, domestic vertically integrated refiners, low
11:20:42 11 cost supply, the ability to bring over the imports as well.

11:20:45 12 Quite often, these guys have a base whether it's
11:20:50 13 a warehouse that they bring sugar in for storage when
11:20:53 14 they're able to buy it cheap. And a number of them have
11:20:56 15 transfer stations, like what we have in Ludlow where they
11:21:00 16 bring in bulk railcars, they breakdown that bulk rail into
11:21:04 17 liquid sugar or bulk dry trucks. They'll often convert it
11:21:08 18 to brown sugar, powdered sugar, and just put EFG in the bag.
11:21:12 19 The whole art of that model for them is they're taking sugar
11:21:16 20 from far away that trades at a very low cost, getting in the
11:21:20 21 area efficiently and make it local for the customer in the
11:21:24 22 way the customer wants it.

11:21:28 23 On top of that, some of these guys are running
11:21:32 24 their own domestic transportation fleets which allows them
11:21:36 25 to control cost in that element. Quite a number of them are

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11:21:37 1 way more lateral than we are because they sell multiple
11:21:40 2 products to the customers whereas we just focus on sugar and
11:21:44 3 molasses.

11:21:45 4 Q. Are distributors located all over the country?

11:21:47 5 A. Yes, they are.

11:21:48 6 Q. And if somebody said the distributors only sell small
11:21:51 7 volumes of refined sugar to customers, would you agree?

11:21:54 8 A. They'd be dead wrong. If you sit down and analyze
11:21:58 9 the numbers, I think they're about 25 percent of the
11:22:01 10 marketplace.

11:22:01 11 Q. We talked a little bit about Imperial's competitors.
11:22:05 12 I would like to ask about Imperial's customers. How many
11:22:08 13 customers does Imperial serve?

11:22:09 14 A. In any particular year I think between two and 300.

11:22:12 15 Q. And what types of customers does Imperial serve?

11:22:15 16 A. So you have the industrial users, you got grocery
11:22:19 17 stores, we also look at club stores because they are a
11:22:23 18 little different than them. You have got -- we also supply
11:22:26 19 the military commissaries as well. You got food service
11:22:30 20 distributors, you know, as I said, distributors of various
11:22:33 21 shapes and sizes throughout the U.S.

11:22:37 22 Q. So Mr. Gorrell, you have explained to us that it's
11:22:40 23 difficult for Imperial to compete. But if that's the case,
11:22:43 24 why is it that Imperial has between 2 and 300 customers per
11:22:46 25 year?

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11:22:48 1 A. Look, because of our cost base as well as, you know,
11:22:53 2 our position in the marketplace we try to set ourselves up
11:22:57 3 to be able to serve a wide array of customers. If somebody
11:23:01 4 is willing and able to pay our higher sugar cost and our
11:23:08 5 processing costs we try to set ourselves up to be able to
11:23:11 6 serve them, quite often that means we're second or third or
11:23:15 7 fourth supplier, sometimes people use the word residual
11:23:19 8 supplier, but also what tends to happen is the domestic
11:23:22 9 processors may sell their sugar much earlier in the selling
11:23:26 10 season and when they're done selling and we -- and/or
11:23:30 11 getting to the end of their selling campaigns, that's when
11:23:34 12 people like us, who are based off the imports, it will be
11:23:38 13 our turn and we'll sell more of our sugar in later in the
11:23:41 14 season.

11:23:41 15 Q. You mentioned Imperial is a residual supplier,
11:23:44 16 correct?

11:23:44 17 A. Yes.

11:23:45 18 Q. Does it also serve as a backup supplier?

11:23:48 19 A. Yes.

11:23:48 20 Q. Does Imperial no -- strike that.

11:23:50 21 How does Imperial know when its prices aren't
11:23:53 22 competitive?

11:23:54 23 A. The customers tell us this all the time.

11:23:56 24 Q. I would like to show you a document, sir, which is
11:23:58 25 marked as Defendants Trial Exhibit 145.

Gorrell - direct

11:24:02 1 Do you have that there, sir?

11:24:04 2 A. Yes, I do.

11:24:05 3 Q. Okay. Could you tell me, what is this?

11:24:08 4 A. This is an e-mail chain that I had received from your
11:24:12 5 team and I forwarded it to LDC management.

11:24:15 6 Q. Did you write the e-mail at the top of this chain?

11:24:18 7 A. Yes, I did.

11:24:19 8 MR. CAMERON: Your Honor, I would like to move
11:24:21 9 Defendants' Trial Exhibit 145 into evidence. I don't
11:24:23 10 believe there are objections.

11:24:24 11 THE COURT: Any objections?

11:24:25 12 MS. GARRETT: No objections.

11:24:26 13 THE COURT: Thank you.

11:24:26 14 (DTX Exhibit No. 145 was admitted into
11:24:27 15 evidence.)

11:24:27 16 BY MR. CAMERON:

11:24:27 17 Q. Mr. Gorrell, could you tell us what this is document?

11:24:30 18 A. This is an e-mail that one of our salespeople, Kim
11:24:35 19 Youngblood, received from a customer, Post Foods, and I was
11:24:39 20 forwarding it to various LDC employees.

11:24:42 21 Q. Which customer was it, did you say Post?

11:24:42 22 A. Post Foods.

11:24:43 23 Q. Now, in Ms. Youngblood's e-mail she refers to
11:24:51 24 Jonesboro and Asheboro, do you see that?

11:24:52 25 A. Yes, I do.

Gorrell - direct

11:24:54 1 Q. Sir, do you know where those cities are located?

11:24:58 2 A. Jonesboro is in Arkansas, Asheboro is in central to
11:25:02 3 east North Carolina.

11:25:03 4 Q. Ms. Youngblood writes in her e-mail "Post can take
11:25:08 5 beet or cane."

11:25:08 6 Do you see that?

11:25:09 7 A. Yes, I do.

11:25:09 8 Q. Sir, where are sugar beets grown?

11:25:13 9 A. Some of them are grown up in Michigan but quite
11:25:16 10 frankly most of them are grown in the northwest province of
11:25:20 11 the country, the Red River Valley we have heard about,
11:25:25 12 Colorado, Montana, quite a lot in Idaho.

11:25:28 13 Q. Sir, why is it a customer that is located in Arkansas
11:25:31 14 or North Carolina would buy beet sugar grown in the
11:25:35 15 northwest and Midwest part of the United States?

11:25:37 16 A. Quite frankly out there they produce more sugar than
11:25:41 17 they use in that quadrant of the country, it's cheap and
11:25:46 18 frankly the U.S. government sets up the program that
11:25:50 19 guarantees them the ability to sell it. A lot of that sugar
11:25:53 20 moves on railcars and it is really an efficient way to get
11:25:57 21 it across the country. If you think about it, you think of
11:25:59 22 the cost advantage they have on us, you can bring bulk sugar
11:26:04 23 all the way from Idaho, you can get it to a Post facility at
11:26:11 24 Asheboro cheaper than we can buy raw sugar and deliver it,
11:26:14 25 so we would have to refine the sugar for free, convince the

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11:26:18 1 railroad to move it to Asheboro for free and they could
11:26:20 2 still beat us in price.

11:26:21 3 Q. Would it be the same for beet farmers looking to ship
11:26:25 4 in Georgia, would they have the same advantage?

11:26:28 5 A. Yes.

11:26:28 6 Q. Look at this e-mail, what is the gist of the feedback
11:26:32 7 that Post is giving Imperial here?

11:26:34 8 A. They're saying we're too high.

11:26:36 9 Q. Was it common for Imperial to hear that feedback from
11:26:39 10 customers?

11:26:39 11 A. We get this all the time.

11:26:40 12 Q. And again that's what you're telling them in this
11:26:43 13 e-mail?

11:26:44 14 A. Yes.

11:26:44 15 Q. Why did you convey this feedback to your colleagues
11:26:49 16 at LDC?

11:26:51 17 A. At that time the business, we were really in rough
11:26:54 18 shape and I was trying to show them look, this is what we're
11:26:57 19 dealing with every day. It's not for lack of effort this
11:27:01 20 business is struggling.

11:27:02 21 Q. Where in the country are Imperial's customers
11:27:05 22 located?

11:27:05 23 A. We sell sugar all over the country but quite honestly
11:27:09 24 if you want to look at where we sell most of our sugar, you
11:27:12 25 draw a line from Texas up to Chicago.

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11:27:16 1 Q. Would that include Pennsylvania, Indiana, Ohio and
11:27:21 2 the like?

11:27:21 3 A. Yes.

11:27:21 4 Q. Does Imperial organize itself into sales regions?

11:27:25 5 A. No, that doesn't really make sense for our business.
11:27:28 6 We look at it by segment.

11:27:30 7 Q. And what do you mean by segment?

11:27:32 8 A. So what we have is two people on distributor and food
11:27:36 9 service, we got two people on consumer grocery and club
11:27:40 10 stories and we got two people on industrial.

11:27:42 11 Q. How does Imperial get refined sugar to its customers?

11:27:45 12 A. We'll ship it to our customers either by truck or
11:27:48 13 railcar or quite often our customers will come to our site
11:27:53 14 and pick it up there.

11:27:55 15 MR. CAMERON: With Your Honor's permission I
11:27:57 16 would like to put up a demonstrative which is demonstrative
11:27:59 17 DDX 005.

11:28:03 18 Q. Mr. Gorrell, what is this?

11:28:04 19 A. This is a chart, we use this in customer
11:28:08 20 presentations sometimes and what you see is the stars are
11:28:12 21 our Savannah sugar refinery. You got those orange diamonds
11:28:15 22 which are two warehouses that we use for package goods.
11:28:20 23 Those yellow diamonds are bulk transfer or melt stations
11:28:24 24 that we use throughout the country.

11:28:30 25 Q. And, sir, how do those transfer stations impact

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11:28:34 1 Imperial's transportation cost?

11:28:36 2 A. What we do is we put it on bulk railcars, get it up
11:28:40 3 there, break it down and into either a bulk truck or it gets
11:28:46 4 liquified there and made liquid sugar and transferred by
11:28:50 5 truck to neighboring customers. It's a way of making our
11:28:53 6 sugar local to the customer and taking the transportation
11:28:56 7 cost out of the system.

11:28:57 8 Q. Can other suppliers use those transfer stations?

11:29:01 9 A. In the Ludlow, Kentucky one, that triangle up in
11:29:05 10 Cincinnati, we just put our own trucks through that. All
11:29:08 11 the other ones, everybody else uses them. Quite frankly I
11:29:13 12 think for our portion of those we're in the minority. We
11:29:16 13 use those a lot less than competitors.

11:29:18 14 Q. Sir, are you aware that the Department of Justice has
11:29:22 15 proposed two potential geographic markets in the case, a
11:29:25 16 broader market and a narrower market?

11:29:28 17 A. Yes.

11:29:28 18 Q. Does Imperial sell sugar outside of those two
11:29:31 19 proposed markets?

11:29:32 20 A. Yes.

11:29:32 21 Q. Do suppliers outside of those two proposed markets or
11:29:37 22 regions compete for customers inside both of those markets?

11:29:42 23 A. Absolutely.

11:29:43 24 Q. How is it possible then for suppliers located outside
11:29:45 25 those two regions to compete for customers inside those

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11:29:49 1 regions?

11:29:49 2 A. Look, you just got to look at their profiles. I
11:29:53 3 mean, the one is right next to us. I mean, there are two
11:29:56 4 sugar refineries in Louisiana, I think maybe the two biggest
11:30:02 5 sugar refineries in the US based on throughput, they're
11:30:05 6 right there, they're closer to a number of customers than we
11:30:09 7 are even out of Savannah. And more importantly, they are
11:30:12 8 way lower cost than we are because of the raw sugar costs.
11:30:19 9 As I talked about with the beet companies, you know, as I
11:30:24 10 mentioned before, you can take beet sugar all the way out in
11:30:27 11 Idaho and move it into the southeast, they can get it into
11:30:31 12 that quadrant of the country quite frankly cheaper than we
11:30:34 13 can get raw sugar to the front door. If you look at the
11:30:40 14 importers, you got a whole range of importers starting with
11:30:43 15 Florida, Alabama, all the way up the east coast where the
11:30:46 16 importers can come in the country at low cost.

11:30:49 17 Q. Mr. Gorrell, I would like to introduce another
11:30:52 18 document which is marked as defendants trial Exhibit 193.
11:30:55 19 It should be in your binder. Do you have that, sir?

11:30:57 20 A. Yes.

11:30:57 21 Q. Can you describe what this is?

11:30:59 22 A. Yes, this is an e-mail back and forth between me and
11:31:02 23 Jonathan Bamberger.

11:31:06 24 MR. CAMERON: Your Honor, I would like to move
11:31:08 25 defendants trial Exhibit 193 into evidence.

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11:31:11 1 MS. GARRETT: No objection.

11:31:13 2 THE COURT: Thank you.

11:31:13 3 (DTX Exhibit No. 193 was admitted into
11:31:14 4 evidence.)

11:31:14 5 BY MR. CAMERON:

11:31:15 6 Q. Mr. Gorrell, if I can direct your attention to the
11:31:17 7 response to Mr. Bamberger in the middle of the page, about
11:31:20 8 halfway, it says sugar moves north into the northeast
11:31:24 9 through Savannah all the time, is that consistent with your
11:31:27 10 understanding today?

11:31:28 11 A. Yes, it's happening today.

11:31:30 12 Q. You also wrote the southeast is surplus and the
11:31:34 13 northeast is deficit. What did you mean about that?

11:31:37 14 A. Basically in the southeast we have more sugar
11:31:40 15 production than we have sugar use, and so more supply less
11:31:45 16 demand and we're surplus, northeast is the opposite, they
11:31:49 17 consume and use more sugar in the northeast than they
11:31:52 18 produce up there, so sugar moves up to the northeast both
11:31:55 19 from the southeast but also from the northwest.

11:31:58 20 Q. When you said southeast in this document, what were
11:32:00 21 you referring to?

11:32:01 22 A. I looked at the southeast quadrant of the country
11:32:04 23 where we got two Louisiana Sugar Refineries, we got the
11:32:08 24 Florida refinery, Savannah refinery, liquid refineries in
11:32:12 25 Memphis or near Memphis, and then CSC has one in Virginia as

Gorrell - direct

11:32:18 1 well.

11:32:18 2 Q. Now, I would like to shift topics and ask about the
11:32:21 3 actual transaction at issue in this case. I think you said
11:32:24 4 that LDC has been trying to sell Imperial for five years, is
11:32:28 5 that correct?

11:32:28 6 A. Yes, just over five years.

11:32:29 7 Q. So, sir, as a nearly thirty-year veteran in the sugar
11:32:34 8 industry in the US, what do you think would happen if United
11:32:38 9 tried to raise prices in the alleged broader market proposed
11:32:41 10 by the DOJ following a merger?

11:32:44 11 A. Quite frankly, I think it would be a dumb move
11:32:48 12 because there is a line of people looking to grow their
11:32:51 13 business and get to the customer. Doing something like
11:32:55 14 that, I don't think it's going to work and frankly it would
11:32:58 15 be a gift to these guys to basically send our customers
11:33:03 16 their way. The last thing you want to do is lose customers
11:33:05 17 especially when you want to get the refinery running up to
11:33:08 18 capacity.

11:33:09 19 Q. If the merger does not proceed, do you have any views
11:33:13 20 regarding Imperial's future?

11:33:15 21 A. Yeah.

11:33:17 22 Q. Could you explain?

11:33:18 23 A. I mean, to be honest, I'm quite worried. The
11:33:22 24 situation that we're in, it's not going to change here,
11:33:25 25 we're going to continue to be the high cost producer, just

Gorrell - cross

11:33:31 1 the way the sugar program is wired, raw sugar is
11:33:34 2 constrained, it's coming in at a very high cost, we can't
11:33:37 3 fully dilute our fixed cost. As I said, we have been for
11:33:42 4 sale for more than half the time that LDC has owned us now
11:33:45 5 so it's not like we're going to change our approach to
11:33:49 6 capital in this case. And there is good reasons for that.
11:33:51 7 Personally I'm not going to give up on this team. They have
11:33:54 8 been through quite a bit in the last twenty-five years, but
11:33:58 9 I think all of us feel grateful each year that we can keep
11:34:02 10 the refinery going. It's not an exciting prospect, but it
11:34:07 11 is what it is.

11:34:08 12 MR. CAMERON: Thank you, Mr. Gorrell.

11:34:12 13 Thank you, Your Honor.

11:34:13 14 THE COURT: Thank you.

11:34:14 15 Ms. Garrett.

11:34:21 16 MS. GARRETT: Good morning. Permission to
11:34:29 17 proceed, Your Honor?

11:34:30 18 THE COURT: Absolutely.

11:34:31 19 CROSS-EXAMINATION

11:34:31 20 BY MS. GARRETT:

11:34:32 21 Q. Good morning, Mr. Gorrell. Nice to meet you in
11:34:34 22 person.

11:34:34 23 A. Good morning. Nice to see you.

11:34:38 24 Q. Prices can go up or down in the sugar market, right?

11:34:42 25 A. Yes, that's correct.

Gorrell - cross

11:34:44 1 Q. And Imperial can have a good financial year or it can
11:34:48 2 have a more difficult financial year, right?

11:34:52 3 A. Yes.

11:34:53 4 Q. Trade patterns can also shift in the sugar market,
11:34:58 5 right?

11:34:58 6 A. They do, yes.

11:34:59 7 Q. And the regulatory framework can change, right?

11:35:03 8 A. The regulatory framework can change, yes.

11:35:07 9 Q. The sugar market is volatile, isn't it?

11:35:10 10 A. It depend on your definition of volatile, but yes,
11:35:14 11 volatile.

11:35:14 12 Q. Well, we had this conversation during your
11:35:19 13 deposition. If you could get your binder there with the
11:35:23 14 blue tab on it, on the front.

11:35:27 15 A. These are pink. But I'll try.

11:35:31 16 Q. The cover.

11:35:34 17 A. Sorry. Got it.

11:35:38 18 Q. I would like to ask you to please turn to page 193,
11:35:42 19 14 of the litigation deposition, it's the second tab.

11:35:46 20 A. Okay.

11:35:50 21 Q. And you will go to page 193, line 14.

11:36:01 22 A. Yes.

11:36:02 23 Q. And I asked you this question the sugar market is
11:36:06 24 volatile, right, and your answer is, the sugar market is
11:36:10 25 volatile. Did I read that correctly?

Gorrell - cross

11:36:12 1 A. Yes, you did.

11:36:13 2 Q. And then I asked you at 193:22, what does volatility
11:36:18 3 mean to you, and your answer at 193:23, volatility to me
11:36:24 4 means that not only do prices go up and down, but you also
11:36:27 5 see over time trade patterns shift. Did I read that
11:36:31 6 correctly?

11:36:32 7 A. Yes.

11:36:33 8 Q. As a sugar refiner -- you can close that binder now.

11:36:38 9 As a sugar refiner, one of the ways you compete
11:36:43 10 is by being reliable; right?

11:36:44 11 A. Yes.

11:36:47 12 Q. And reliability can mean quality, right?

11:36:51 13 A. One of them.

11:36:52 14 Q. And reliability can mean timely delivery, right?

11:36:54 15 A. Yes.

11:36:57 16 Q. You are responsible for letting your senior managers
11:37:02 17 know how the Imperial business is doing; right?

11:37:05 18 A. Yes.

11:37:06 19 Q. And you prepare structured monthly management
11:37:10 20 presentations for senior managers at LDC, right?

11:37:14 21 A. Yes, together with one other person.

11:37:16 22 Q. Is that other person Maureen Orloski?

11:37:20 23 A. Yes.

11:37:24 24 Q. Maureen Orloski, she is the comptroller for North
11:37:25 25 American Sugar, right?

Gorrell - cross

11:37:26 1 A. Yes.

11:37:26 2 Q. And you work with Maureen to provide accurate monthly
11:37:30 3 presentations to the managers at LDC, right?

11:37:32 4 A. We do, yes.

11:37:35 5 Q. If you please turn to page PTX 117 in your binder
11:37:40 6 without the blue tab.

11:37:41 7 A. I'm sorry, what number was that again?

11:37:44 8 Q. 117.

11:37:46 9 A. Okay. Got it.

11:37:51 10 Q. PTX 117 is a December 20th, '21 e-mail from Maureen
11:37:58 11 Orloski with an attachment, right?

11:38:01 12 A. Yes, it is.

11:38:03 13 Q. And the attachment to the e-mail in PTX 117 is the
11:38:08 14 October 2021 North American Sugar Platform Overview.

11:38:12 15 Correct?

11:38:12 16 A. Yes, it is.

11:38:14 17 MS. GARRETT: Your Honor, plaintiff would like
11:38:15 18 to move PTX 117 into evidence, but we ask that we turn off
11:38:20 19 the public screen because a significant portion of the
11:38:23 20 information that we're going to discuss has been designated
11:38:27 21 as confidential, but we want to make it easier for you, too.

11:38:30 22 MR. CAMERON: And no objection, Your Honor.

11:38:32 23 THE COURT: All right.

11:38:34 24 (PTX Exhibit No. 117 was admitted into
11:38:37 25 evidence.)

Gorrell - cross

11:38:37 1 BY MS. GARRETT:

11:38:38 2 Q. Could you please turn to the page ending in 487. It
11:38:44 3 has the heading, NA Sugar Historical Cash Flow. And we're
11:38:51 4 going to put that up on the screen for you, too, to make it
11:38:54 5 a little bit easier to see.

11:38:57 6 Now, NA sugar refers to the business being sold
11:39:02 7 to US Sugar, right?

11:39:03 8 A. Yes, it is. There is very, very small carve out, but
11:39:08 9 it's insignificant.

11:39:09 10 Q. And we are going to discuss this document, but I ask
11:39:14 11 that you do not say the actual numbers because they have
11:39:18 12 been designated as confidential by your counsel. Okay?

11:39:21 13 A. Okay.

11:39:23 14 Q. Now, do you see the column with the heading Total
11:39:28 15 Life to Date 2021?

11:39:30 16 A. Yes, I do.

11:39:31 17 Q. And do you see EBITDA row?

11:39:37 18 A. Yes, I do.

11:39:38 19 Q. The number in the EBITDA row of total life to date
11:39:43 20 2021 column is positive, right?

11:39:45 21 A. Yes, it is.

11:39:48 22 Q. Now, do you see the row entitled total incremental
11:39:53 23 cash to LDC less working capital. It's highlighted there on
11:39:58 24 your screen?

11:40:00 25 A. Yes, I see that.

Gorrell - cross

11:40:02 1 Q. And in that same 2021 column, the total incremental
11:40:08 2 cash to LDC less working capital row is positive; right?

11:40:13 3 A. Yes, it is.

11:40:14 4 Q. Now this whole chart on this page in PTX 117 is
11:40:21 5 reported in thousands, right?

11:40:23 6 A. Yes, it is.

11:40:24 7 Q. So we will have to add three zeros to the numbers in
11:40:28 8 the table to get the actual figures, right?

11:40:30 9 A. You are correct.

11:40:31 10 Q. We can put PTX 117 to the side.

11:40:35 11 Mr. Gorrell, LDC's bonuses are discretionary,
11:40:41 12 right?

11:40:42 13 A. Yes, they are.

11:40:43 14 Q. You've received a bonus from LDC the last three years
11:40:48 15 of your employment, correct?

11:40:49 16 A. Yes, I have.

11:40:50 17 Q. Could you please turn to JTX 51. It's the first tab
11:40:55 18 in your binder?

11:40:57 19 MS. GARRETT: And Your Honor, with your
11:40:58 20 permission, counsel has requested that Mr. Gorrell's
11:41:00 21 compensation information not be shown in public, so
11:41:02 22 plaintiff is offering JTX 51 without saying the actual
11:41:10 23 figures that are in that particular document.

11:41:12 24 THE COURT: Okay. And you're offering that into
11:41:22 25 evidence?

Gorrell - cross

11:41:22 1 MS. GARRETT: Yes, Your Honor.

11:41:24 2 MR. CAMERON: No objection, Your Honor.

11:41:26 3 THE COURT: It's admitted.

11:41:28 4 (JTX Exhibit No. 51 was admitted into evidence.)

11:41:29 5 BY MS. GARRETT:

11:41:29 6 Q. Mr. Gorrell, JTX 51 is a document prepared at your
11:41:35 7 counsel's request. Figure A in JTX 51 is the bonus you
11:41:39 8 received last year, right?

11:41:41 9 A. That is correct.

11:41:41 10 Q. And figure B in JTX 51 is the bonus you will receive
11:41:47 11 if US Sugar's acquisition of Imperial closes while you're an
11:41:51 12 LDC employee, right?

11:41:53 13 A. That is correct.

11:41:55 14 Q. I would like to turn to tab PTX 106 in your binder.
11:42:03 15 It's the third tab.

11:42:06 16 A. Okay.

11:42:06 17 Q. PTX 106 is a July 2021 e-mail from you to USDA
11:42:14 18 officials attaching a letter to Secretary Vilsack and
11:42:19 19 others, correct?

11:42:19 20 A. That is correct.

11:42:22 21 Q. And could you just turn to the last page you have in
11:42:24 22 that exhibit, your signature is there at the end of that
11:42:27 23 letter; is that correct?

11:42:28 24 A. That is correct.

11:42:29 25 MS. GARRETT: Your Honor, plaintiffs move to

Gorrell - cross

11:42:30 1 admit PTX 106 as evidence.

11:42:33 2 MR. CAMERON: No objection, Your Honor.

11:42:35 3 THE COURT: Thank you. It's admitted.

11:42:37 4 (PTX Exhibit No. 106 was admitted into
11:42:38 5 evidence.)

11:42:38 6 BY MS. GARRETT:

11:42:39 7 Q. So we'll put that on the screen and I want to draw
11:42:42 8 your attention to the first page of your letter which begins
11:42:45 9 on the page ending in 983. And you can see that on the
11:42:50 10 screen for you there. On 983 the first line starts, "Thank
11:42:54 11 you for your July 1st response to our April letter."

11:43:00 12 Do you see that?

11:43:00 13 A. Yes, I do.

11:43:01 14 Q. Now, you wrote the USDA at least twice in 2021 to
11:43:07 15 request more sugar imports, correct?

11:43:09 16 A. I believe that's correct, yes.

11:43:11 17 Q. Now, if you turn the page and turn your attention to
11:43:15 18 the second bullet in the second to last paragraph of PTX
11:43:20 19 106, I would like to draw your attention there. And we're
11:43:24 20 going to put it on the screen for you as well.

11:43:27 21 In July 2021, you recommended that the USDA
11:43:31 22 increase TRQ imports by 200,000 tons; right?

11:43:35 23 A. Yes, I did.

11:43:37 24 Q. And we can -- let me just ask. In response to your
11:43:42 25 2021 letter, the USDA at multiple points throughout the year

Gorrell - cross

11:43:49 1 increased the supply of sugar, right?

11:43:52 2 A. Yes, they did.

11:43:54 3 Q. But that same year, Imperial still had to increase
11:43:59 4 prices to its customers, right?

11:44:01 5 A. Yes, we did, because we unfortunately still had to
11:44:07 6 import raw sugar paying the high-tier duty throughout the
11:44:11 7 later part of the year.

11:44:12 8 Q. So Imperial increased its price in 2021, right?

11:44:16 9 A. Yes, commensurate with our raw sugar price increases
11:44:20 10 that we were incurring.

11:44:21 11 Q. I'm sorry, Mr. Gorrell, I'm just asking a yes or no
11:44:25 12 question. Did you increase the prices in the 2021 despite
11:44:29 13 the letter writing to the USDA?

11:44:32 14 A. Yes, we did.

11:44:33 15 Q. Can you please turn to PTX 350 in your binder.

11:44:39 16 A. Okay.

11:44:40 17 Q. Now, you're familiar with how Imperial operates,
11:44:43 18 right?

11:44:43 19 A. Yes, I am.

11:44:45 20 Q. And you were also involved in soliciting potential
11:44:50 21 buyers for the business, right?

11:44:51 22 A. Yes, I was.

11:44:52 23 Q. PTX 350 is a version of the presentation Imperial
11:44:57 24 used when soliciting US Sugar to buy Imperial Sugar?

11:44:59 25 A. Yes.

Gorrell - cross

11:45:01 1 MS. GARRETT: Your Honor, plaintiffs would like
11:45:03 2 to move PTX 350 into evidence.

11:45:05 3 MR. CAMERON: No objection, Your Honor.

11:45:06 4 THE COURT: Thank you. It's admitted.

11:45:06 5 (PTX Exhibit No. 350 was admitted into
11:45:08 6 evidence.)

11:45:08 7 BY MS. GARRETT:

11:45:09 8 Q. Earlier you were talking about your capacity
11:45:11 9 utilization, moments ago. Do you recall that testimony?

11:45:13 10 A. Yes, I do.

11:45:14 11 Q. Could you please turn to page 9 of PTX 350. PTX 350
11:45:20 12 states that the capacity utilization at the refinery is
11:45:25 13 approximately 80 to 90 percent. Right? Do you see that
11:45:29 14 there?

11:45:29 15 A. Yes, I see that.

11:45:30 16 Q. If you please turn to page 24 of PTX 350. And we'll
11:45:41 17 put that on the screen for you as well. PTX 350 describes
11:45:46 18 Imperial's packaging facility as state of the art, right?

11:45:50 19 A. Yes, it does.

11:45:51 20 Q. We can put PTX 350 to the side.

11:45:52 21 I would like to direct your attention to an
11:46:01 22 exhibit that you looked at in the smaller black binder that
11:46:04 23 you used with Mr. Cameron, that was your defendants' binder
11:46:10 24 there.

11:46:14 25 A. Sorry, struggling.

Gorrell - cross

11:46:17 1 THE COURT: If you need more room, you can put
11:46:20 2 things up here on the side.

11:46:22 3 THE WITNESS: Thank you.

11:46:22 4 Q. And I want to draw your attention to -- that's the
11:46:25 5 one that you need to use, right there that you moved out of
11:46:28 6 your way, the black binder, and I want to draw your
11:46:31 7 attention to DTX 219.

11:46:34 8 A. Okay.

11:46:34 9 Q. And I would like for you to turn to page 16 of DTX
11:46:39 10 219. And it doesn't have the page number on it, but it's
11:46:48 11 right after 15, so if you get to 15, you'll see the next
11:46:51 12 one.

11:46:51 13 A. See that.

11:46:53 14 MS. GARRETT: Your Honor, the heading -- I
11:46:55 15 apologize.

11:46:56 16 Q. Mr. Gorrell, the heading of the page ending in DTX
11:47:02 17 219, the heading on the page 16 of DTX 219 which is not
11:47:09 18 numbered, says threats 4/4, the portfolio dimension, right?

11:47:15 19 A. Yes, I see that.

11:47:17 20 Q. And one of the threats identified in DTX 219 is on
11:47:25 21 paper, close competitors such as United in Florida should
11:47:30 22 invest in an efficient packaging line, reshape their sales
11:47:36 23 force and attack Imperial packaged margins, do you see that?

11:47:40 24 A. I see that, yes.

11:47:42 25 Q. We can put DTX 219 to the side.

Gorrell - cross

11:47:46 1 I would like to turn your attention to PTX and
11:47:50 2 we're going to go back to the white binder without the blue
11:47:54 3 tab on the front. Okay?

11:47:56 4 A. Yes, ma'am.

11:47:58 5 Q. And I want to draw your attention to PTX 145.

11:48:08 6 A. Okay.

11:48:10 7 Q. Now, you receive e-mails sent to the SGL refined
11:48:17 8 trading?

11:48:17 9 A. Yes I do.

11:48:18 10 Q. And PTX 145 contains an e-mail to the SGL refined
11:48:24 11 trading group, right?

11:48:26 12 A. Yes, it does.

11:48:27 13 MS. GARRETT: Your Honor, plaintiffs move to
11:48:29 14 admit PTX 145.

11:48:30 15 MR. CAMERON: No objection, Your Honor.

11:48:31 16 THE COURT: It's admitted.

11:48:31 17 (PTX Exhibit No. 145 was admitted into
11:48:34 18 evidence.)

11:48:34 19 BY MS. GARRETT:

11:48:34 20 Q. We'll put this up on the screen. I would like to
11:48:37 21 draw your attention to the August 28th, 2019, e-mail and
11:48:40 22 we're going to bring that up larger for us. We can see it a
11:48:43 23 little better. This is an e-mail from, sent on Wednesday,
11:48:46 24 August 28, 2019. If you look at the actual document, you
11:49:00 25 can see that's from the side of the -- Beth Smith is a

Gorrell - cross

11:49:07 1 salesperson at Imperial, correct?

11:49:09 2 A. Yes, she is.

11:49:11 3 Q. This is a discussion about Bud's Best Cookies as a
11:49:15 4 new customer, is that correct?

11:49:16 5 A. Yes it is.

11:49:16 6 Q. And Ms. Smith wrote in the second line of that
11:49:20 7 e-mail, "United came back and offered them better, but I'm
11:49:22 8 happy to say, they chose us."

11:49:24 9 Did I read that correctly?

11:49:26 10 A. Yes, you did.

11:49:27 11 Q. You can put PTX --

11:49:30 12 THE COURT: More importantly, did you get the
11:49:32 13 samples of the cookies?

11:49:34 14 THE WITNESS: No, I didn't, unfortunately.

11:49:37 15 Q. Mr. Gorrell, I just would like to ask a couple of
11:49:40 16 questions about your direct or indirect communications with
11:49:43 17 your competitors. Now, you do not share your pricing
11:49:47 18 strategy with your competitors, do you?

11:49:49 19 A. No, we do not.

11:49:52 20 Q. And you do not share your spot prices with your
11:49:55 21 competitors either, right?

11:49:57 22 A. That is correct.

11:50:00 23 Q. It is against Imperial's company policy to share spot
11:50:03 24 pricing information with Imperial's competitors, right?

11:50:06 25 A. That is correct.

Gorrell - redirect

11:50:14 1 MS. GARRETT: Thank you. No further questions.

11:50:16 2 THE COURT: All right. Thank you.

11:50:17 3 Redirect.

11:50:18 4 REDIRECT EXAMINATION

11:50:19 5 BY MR. CAMERON:

11:50:20 6 Q. Mr. Gorrell, just a couple of quick questions.

11:50:24 7 Plaintiffs counsel asked you about the document
11:50:28 8 that increased prices in 2021 despite the fact that you had
11:50:32 9 wrote a letter to the USDA. And I think you were in the
11:50:35 10 process of explaining that but weren't able to, so I wanted
11:50:38 11 to give you the opportunity to finish what you were trying
11:50:41 12 to say?

11:50:44 13 A. So basically, what I was saying is that USDA did
11:50:47 14 increase supply but unfortunately they did not increase
11:50:50 15 supply to the point where we would be able to operate a
11:50:53 16 sugar refinery for the balance of year without having to
11:50:56 17 import raw sugar from the world market and pay the high-tier
11:51:00 18 duty which is 15.4 cents.

11:51:02 19 THE COURT: What is the low tier duty?

11:51:04 20 THE WITNESS: The low tier duty is \$0.064 per
11:51:07 21 pound, but that low tier duty is waived for any countries
11:51:10 22 that have preferential agreements with US, so zero from
11:51:13 23 Mexico, Central America, basically forty something countries
11:51:16 24 that have access to U.S. under the preferential programs.
11:51:19 25 The only ones that actually pay the duty I think are

Gorrell - redirect

11:51:30 1 Argentina and Brazil. Maybe I'm missing one or two, GSP and
11:51:36 2 its programs are waived.

11:51:37 3 Q. Ms. Garrett also directed you to plaintiffs trial
11:51:40 4 Exhibit 350 and a reference in that document to the capacity
11:51:44 5 utilization of 80 to 90 percent. Could you explain
11:51:48 6 utilization was at that level at that time and how it
11:51:53 7 relates to what we talked about previously?

11:51:55 8 A. Yeah, March 4th, 2020, we were reacting to the beet
11:52:01 9 freeze, so in truth I think during the calendar year 2020,
11:52:04 10 we averaged 86 or 87 percent, so that was our expectation at
11:52:11 11 the time. Unfortunately there were more opportunity for us,
11:52:14 12 but reliability issues got to us, we didn't refine as much
11:52:19 13 sugar as we hoped that year.

11:52:21 14 Q. Was that level of utilization capacity unusual in
11:52:26 15 your experience?

11:52:26 16 A. I think that was a twenty year record, maybe 2003,
11:52:30 17 they closed the sugar refinery in 2003 in Sugarland so there
11:52:35 18 was a temporary surge in Savannah.

11:52:39 19 Q. And that was because of the beet freeze?

11:52:41 20 A. 2020 was because of the beet freeze.

11:52:42 21 Q. And so would you change your testimony in any way
11:52:42 22 about the fact that the average capacity utilization at the
11:52:50 23 Port Wentworth refinery is 75 percent?

11:52:52 24 A. That is correct, we have ranged from the low sixties
11:52:52 25 up to this record that we had in 2020.

Gorrell - redirect

11:53:01 1 Q. Ms. Garrett also asked you about a reference in a
11:53:04 2 PowerPoint to the state of the art packaging facilities at
11:53:09 3 Port Wentworth. Does that have any connection to the
11:53:12 4 accident that you describe during your direct testimony?

11:53:15 5 A. Yes, the insurance rebuild, it was about
11:53:19 6 \$225 million. I wasn't there at the time, but they were
11:53:25 7 quite proud of it and one of the big things in that space.
11:53:28 8 We were moving sugar around the facility with a pipeline,
11:53:32 9 the accident occurred due to conveyers, so basically food
11:53:36 10 safe and people safe which is one of the big things, that
11:53:40 11 alone was a \$30 million investment.

11:53:42 12 Q. Is it correct that you still have those facilities
11:53:44 13 from the 1940's that you mentioned operating alongside that
11:53:48 14 packaging facility?

11:53:49 15 A. Yeah, unfortunately yes.

11:53:52 16 MR. CAMERON: Thank you very much.

11:53:53 17 Thank you, Your Honor.

11:53:54 18 THE COURT: Thank you, sir. You are excused.

11:53:56 19 What's next?

11:53:57 20 MR. BUTERMAN: Your Honor, defendant calls Neil
11:53:59 21 Smith. Neil Smith is the senior vice-president of sugar
11:54:02 22 manufacturing at US Sugar. My colleague, Ms. Reeves, will
11:54:04 23 be handling that.

11:54:20 24 COURT CLERK: Please raise your right hand.

11:54:30 25 Please state and spell your full name for the record.

Smith - direct

11:54:37 1 THE WITNESS: Neil Franklin Smith. N-E-I-L,
11:54:44 2 F-R-A-N-K-L-I-N, S-M-I-T-H.

11:54:44 3 NEIL FRANKLIN SMITH, having been duly sworn, was
11:54:52 4 examined and testified as follows:

11:54:52 5 DIRECT EXAMINATION

11:54:58 6 BY MS. REEVES:

11:54:59 7 Q. Good afternoon, Mr. Smith. Can you please state your
11:55:02 8 name for the record.

11:55:03 9 A. I'm Neil Franklin Smith.

11:55:04 10 Q. What is your position at US Sugar?

11:55:06 11 A. I'm the senior vice-president of sugar manufacturing.

11:55:09 12 Q. And when you first joined US Sugar in 2002, what was
11:55:13 13 your role?

11:55:14 14 A. I was a refinery manager.

11:55:16 15 Q. When did you take on your current role?

11:55:19 16 A. In 2006.

11:55:21 17 Q. How long have you been in the sugar business?

11:55:23 18 A. Forty-two years.

11:55:26 19 Q. Can you give us a brief description of the positions
11:55:29 20 you have held in the sugar industry over the last
11:55:32 21 forty-two years?

11:55:34 22 A. Had an international career in sugar holding
11:55:37 23 positions in production and research during the first ten
11:55:40 24 years. And then largely in management and senior management
11:55:43 25 the last thirty-two years, fixing troubled plants.

Smith - direct

11:55:48 1 Q. And what was your last job prior to coming to US
11:55:53 2 Sugar?

11:55:53 3 A. I worked for a beet factory in North Dakota.

11:55:57 4 Q. Why were you hired there?

11:55:58 5 A. It's a troubled plant and they needed my expertise.

11:56:01 6 Q. Do you know why you were hired by US Sugar?

11:56:03 7 A. The same reason, there was a troubled plant needing
11:56:07 8 my expertise.

11:56:08 9 Q. What are your responsibilities at US Sugar today?

11:56:11 10 A. Basically I take the -- the cane is delivered to the
11:56:15 11 factory, I take it from a stalk of sugarcane, I turn it into
11:56:19 12 a granular refined sugar. I have a multi discipline
11:56:23 13 workforce, approximately 440 people. And I also control the
11:56:27 14 ancillary plants that help support making and refining
11:56:31 15 sugar.

11:56:32 16 Q. I would like to pull up what has been marked exhibit
11:56:37 17 JTX 035.

11:56:39 18 Mr. Smith, do you have that in front of you?

11:56:41 19 A. I do.

11:56:42 20 Q. Do you recognize this document?

11:56:43 21 A. Yes.

11:56:43 22 Q. And what is it?

11:56:45 23 A. It was internal report I prepared, the proposed
11:56:51 24 operation strategy that we would be following
11:56:54 25 post-acquisition of Port Wentworth refinery.

Smith - direct

11:56:56 1 Q. And the Port Wentworth is the Imperial refinery?

11:56:58 2 A. The Imperial refinery, yes.

11:57:00 3 Q. How have you been involved in evaluating the proposed
11:57:04 4 acquisition of Imperial by US Sugar?

11:57:06 5 A. My responsibility has been on the technical side so I
11:57:11 6 have made a technical evaluation of the Imperial refinery.

11:57:15 7 Q. And as part of the technical analysis, what did you
11:57:18 8 do?

11:57:18 9 A. We visited the plant on several occasions, we took a
11:57:21 10 look at the equipment, met with certain key staff, reviewed
11:57:25 11 documentation, brought in a team of my own experts to look
11:57:30 12 at different aspects of the plant as well as some outside
11:57:34 13 consultants to look at stuff which required specialty for.

11:57:38 14 Q. Focusing not on the packaging facility which was
11:57:42 15 rebuilt after the fire, but focusing on the refinery, what
11:57:47 16 was your view of the facility after you visited it?

11:57:49 17 A. It was a dump.

11:57:50 18 Q. Why is that your opinion?

11:57:52 19 A. Well, like many factories that had three owners in
11:58:00 20 the last thirty years, they haven't necessarily invested
11:58:04 21 properly in the plant, there is peeling paint, rusted steel,
11:58:08 22 leaking pipes, broken concrete, just generally it's not well
11:58:13 23 maintained.

11:58:14 24 Q. Let's look at what you have done at Clewiston since
11:58:17 25 you have been there. Can we turn to page 13, please. And

Smith - direct

11:58:22 1 what does the graph show, Mr. Smith?

11:58:25 2 A. That is the -- the graph represents the annual
11:58:30 3 production and the average daily production of the Clewiston
11:58:34 4 refinery from the years '06, '07, to the years '19, '20.

11:58:39 5 Q. And the actual production are the green bars and the
11:58:42 6 average daily production is the black line?

11:58:44 7 A. Yes.

11:58:44 8 Q. And based on this chart, what was the annual
11:58:48 9 production at the Clewiston refinery in the 2006/2007 time
11:58:53 10 period?

11:58:53 11 A. It was at about 11.1 million hundredweight.

11:58:56 12 Q. What is the annual production of the Clewiston
11:59:01 13 refinery in the 2019/2020 refinery year?

11:59:02 14 A. About 17 hundredweight.

11:59:05 15 Q. 17.9?

11:59:07 16 A. 17.9.

11:59:08 17 Q. And that's an increase of about seven million
11:59:11 18 hundredweight?

11:59:12 19 A. That's correct.

11:59:12 20 Q. And increase of percentage of production at about 65
11:59:16 21 percent?

11:59:16 22 A. Yes.

11:59:16 23 Q. Were you involved in achieving this increase?

11:59:19 24 A. Yes, I was.

11:59:19 25 Q. And how was US Sugar able to achieve this increase?

Smith - direct

11:59:24 1 A. In 2006 when I took over, I instituted a program of
11:59:29 2 operational excellence, which focused upon many aspects of
11:59:33 3 the plant, trying to take it from a reactive to a proactive
11:59:39 4 culture and identify where to apply the resources and
11:59:42 5 capital that we had available to make the biggest impact in
11:59:47 6 increases refined sugar.

11:59:49 7 Q. What are metrics?

11:59:50 8 A. Metrics are measurement devices used within that
11:59:53 9 particular program. Aimed largely at identify -- it's
11:59:58 10 triage process, what we're doing is we're looking to measure
12:00:01 11 things that affect refined sugar output and with that, we're
12:00:05 12 able to work out which are the most important things to
12:00:08 13 spend our money on.

12:00:09 14 Q. After you took over the plant in 2006, how many
12:00:14 15 metrics did your team develop at Clewiston?

12:00:16 16 A. Hundreds.

12:00:17 17 Q. Were these metrics in place prior to your arrival?

12:00:20 18 A. Largely not.

12:00:21 19 Q. And let's now talk about the implications of that for
12:00:25 20 the throughput rate. Have the metrics and organization
12:00:28 21 although excellence program we just discussed allowed US
12:00:32 22 Sugar to run Clewiston at a higher average throughput rate?

12:00:33 23 A. Yes, they have.

12:00:36 24 Q. Have those changes allowed US Sugar to run Clewiston
12:00:39 25 for more days during the year?

Smith - direct

12:00:41 1 A. Yes, they have.

12:00:41 2 Q. Since 2006 how has US Sugar changed the number of
12:00:46 3 operational days at Clewiston?

12:00:47 4 A. In 2006, I think they ran 310 days, by '19, 2019,
12:00:53 5 2020, we have been running about 355 days.

12:00:58 6 Q. And now let's talk about Port Wentworth. How would
12:01:01 7 you describe the current operating philosophy at the Port
12:01:07 8 Wentworth plant?

12:01:07 9 A. I think the way I describe it, it's a flex-type
12:01:10 10 running option, it flexes based upon sales.

12:01:14 11 Q. What do you mean it runs in like a flex state?

12:01:17 12 A. Unlike other facilities like our own, which would run
12:01:21 13 on a steady state situation, this particular plant speeds up
12:01:24 14 and slows down its operations, will shut down for more days,
12:01:28 15 causing more stress upon the equipment to meet sales
12:01:31 16 demands.

12:01:31 17 Q. And comparing flex state to the operational
12:01:34 18 philosophy at Clewiston, what is the philosophy at
12:01:41 19 Clewiston?

12:01:41 20 A. The philosophy at Clewiston basically we're looking
12:01:42 21 for a steady state operation, it's more consistent, anything
12:01:42 22 that runs a steady state, it's more efficient.

12:01:52 23 Q. Does US Sugar plan to increase the number of
12:01:52 24 operating days at Port Wentworth?

12:01:52 25 A. It does.

Smith - direct

12:01:59 1 Q. How many days do you plan to ultimately operate Port
12:02:03 2 Wentworth?
12:02:04 3 A. 355 days.
12:02:05 4 Q. You plan to use metrics to do this?
12:02:07 5 A. Yes, indeed.
12:02:08 6 Q. Do you know what Port Wentworth's production amount
12:02:11 7 was in 2020?
12:02:13 8 A. It was about 16.1 million, I believe.
12:02:18 9 Q. And did you perform an analysis to estimate the
12:02:20 10 amount of output that US Sugar can achieve at the Port
12:02:25 11 Wentworth facility?
12:02:25 12 A. I did.
12:02:25 13 Q. And what was the result of that analysis?
12:02:27 14 A. We could probably produce the 17 hundredweight.
12:02:33 15 Q. And does US Sugar have a plan for how it will achieve
12:02:37 16 the 17.5 million hundredweight production amount?
12:02:40 17 A. Yes, it does.
12:02:41 18 Q. How does it plan to do that?
12:02:42 19 A. It will be by duplicating what we did at Clewiston,
12:02:47 20 we will end up utilizing operational excellence initiative
12:02:52 21 and target capital application.
12:02:52 22 Q. Based on your forty-two years of experience and your
12:02:53 23 history with restoring troubled plants, do you believe US
12:03:02 24 Sugar will be able to achieve its planned increase at Port
12:03:02 25 Wentworth?

Smith - direct

12:03:06 1 A. Yes, indeed.

12:03:07 2 Q. Why?

12:03:07 3 A. We have done it before. We have got a track record,
12:03:11 4 we have the right people, the right subject matter experts,
12:03:14 5 we know how to do this and we're able to take that knowledge
12:03:18 6 and be able to apply it to Imperial facility.

12:03:22 7 Q. And do you believe that Imperial could achieve this
12:03:25 8 capacity increase without US Sugar?

12:03:27 9 A. No.

12:03:27 10 Q. Why not?

12:03:28 11 A. They don't have the culture that is necessary to be
12:03:30 12 able to implement such a program.

12:03:34 13 Q. And the expertise?

12:03:38 14 A. Or the expertise.

12:03:39 15 Q. And Mr. Smith, if US Sugar is able to close the
12:03:42 16 transaction of Imperial, who will be in charge of running
12:03:45 17 the Port Wentworth facility?

12:03:47 18 A. I will.

12:03:50 19 MS. REEVES: Thank you, Your Honor. No further
12:03:52 20 questions. Defendants would like to move JTX 035 into
12:03:57 21 evidence.

12:03:57 22 THE COURT: Any objection?

12:03:58 23 MS. PEARL: No objection.

12:04:00 24 THE COURT: It's admitted.

12:04:00 25 (JTX Exhibit No. 035 was admitted into

Smith - cross

12:04:04 1 evidence.)

12:04:10 2 MS. PEARL: Good afternoon, Your Honor. My name
12:04:13 3 is Stephanie Pearl on behalf of the United States. May I
12:04:14 4 proceed?

12:04:15 5 THE COURT: Please.

12:04:16 6 CROSS-EXAMINATION

12:04:16 7 BY MS. PEARL:

12:04:17 8 Q. Good afternoon.

12:04:18 9 During 2020, you and your team made several
12:04:21 10 visits to Imperial to assess the operations of the plant,
12:04:25 11 correct?

12:04:25 12 A. Yes.

12:04:26 13 Q. And you and your team put together a trip reports
12:04:28 14 based on these visits, correct?

12:04:30 15 A. Correct.

12:04:30 16 Q. And these reports were presented to the lenders of
12:04:33 17 the deal, correct?

12:04:34 18 A. I believe so.

12:04:35 19 Q. Based on your visits, you would agree that Imperial's
12:04:38 20 packaging facility is impressive, right?

12:04:41 21 A. Yes.

12:04:41 22 Q. And you also learned during your site visits that
12:04:45 23 Imperial had increased its average monthly raw sugar melt
12:04:48 24 over the last few years, correct?

12:04:50 25 A. Correct.

Smith - cross

12:04:52 1 Q. Now, Mr. Smith, your proposed post transaction plan
12:04:57 2 for Port Wentworth is based on a plan as you discussed that
12:05:03 3 you used at US Sugar, correct?

12:05:06 4 A. Repeat the question.

12:05:07 5 Q. Your proposed post-transaction plan for Port
12:05:13 6 Wentworth is based on a plan that you used at US Sugar,
12:05:15 7 correct?

12:05:16 8 A. Correct.

12:05:16 9 Q. You didn't put together this plan for US Sugar by
12:05:19 10 yourself, right?

12:05:20 11 A. Correct.

12:05:21 12 Q. You hired a third party, correct?

12:05:24 13 A. We hired two third parties to give us input into it.

12:05:28 14 Q. And one of these third parties that you mentioned
12:05:31 15 helped put in place the backbone of your plan, correct?

12:05:35 16 A. Yes. Okay. Correct.

12:05:39 17 Q. And this third party presented areas for US Sugar to
12:05:42 18 focus on, correct?

12:05:43 19 A. Correct.

12:05:44 20 Q. And US Sugar followed this third-party guidance,
12:05:48 21 right?

12:05:50 22 A. We haven't taken possession, so I would say no, we
12:05:54 23 haven't taken possession, so we can't actually say we
12:05:58 24 followed that guidance until we actually do it.

12:06:00 25 Q. I'm talking about at US Sugar you hired a third

Smith - cross

12:06:04 1

party?

12:06:04 2

A. I'm sorry, my apologies, it was a joint effort. What

12:06:08 3

they did was help facilitate the understanding but we

12:06:11 4

developed the metrics ourselves.

12:06:13 5

Q. Mr. Smith, you were deposed, I took your deposition a

12:06:17 6

couple of months ago, correct?

12:06:18 7

A. Correct.

12:06:19 8

Q. You have a binder in front of you. And the

12:06:24 9

last tab is a depo transcript, do you see that.

12:06:31 10

A. Yes.

12:06:31 11

Q. We're go to turn to page 215 of your deposition

12:06:35 12

transcript. Are you there?

12:06:41 13

A. I am.

12:06:47 14

Q. All right. So we were talking about your work at

12:06:50 15

Clewiston at this point. And if you look at line 4, you

12:06:54 16

were asked, "Did you come up with this list or did Lifecycle

12:06:58 17

Engineering at Charleston?"

12:06:59 18

Did I read that correctly?

12:07:01 19

A. Yes.

12:07:02 20

Q. And line 6, "It was basically we brought in

12:07:07 21

Lifecycle. We talked to them. They presented the areas

12:07:10 22

that we needed to do, and we followed their guidance."

12:07:12 23

Did I read that correctly?

12:07:13 24

A. Yes.

12:07:18 25

Q. Mr. Smith, if you could turn in your binder to PTX

Smith - cross

12:07:22 1 512. It's in the same binder.

12:07:39 2 A. I don't appear to have a tab that says 512. I have
12:07:45 3 534, 535.

12:07:49 4 Q. It could be one of the earlier tabs. I can bring you
12:07:52 5 a copy if that's okay with Your Honor?

12:07:54 6 A. That's okay.

12:07:58 7 Q. No worries. And Mr. Smith, do you see this is an
12:08:01 8 e-mail from Derek du Plooy to yourself, Neil Smith?

12:08:04 9 A. Yes.

12:08:05 10 Q. It's dated February 17, 2021?

12:08:07 11 A. I do.

12:08:08 12 Q. And it's attaching a report on Clewiston
12:08:11 13 transformation, do you see that?

12:08:12 14 A. Yes.

12:08:12 15 Q. Do you recognize this cover letter and the attached
12:08:16 16 document?

12:08:21 17 A. Yes.

12:08:24 18 Q. And this document was prepared at your request;
12:08:27 19 correct?

12:08:27 20 A. Correct.

12:08:28 21 Q. This document provides more detail about your work at
12:08:31 22 Clewiston, right?

12:08:32 23 A. Yes.

12:08:34 24 MS. PEARL: Your Honor, we offer into evidence
12:08:36 25 PTX 512.

Smith - cross

12:08:40 1 MS. REEVES: No objection.

12:08:41 2 THE COURT: Thank you, it's admitted.

12:08:41 3 (PTX Exhibit No. 512 was admitted into
12:08:43 4 evidence.)

12:08:43 5 BY MS. PEARL:

12:08:43 6 Q. Mr. Smith, let's talk about your proposed post
12:08:46 7 transaction Port Wentworth plan which I discussed during
12:08:49 8 your direct.

12:08:50 9 Sir, just to start, you don't know why Imperial
12:08:51 10 has made a business judgment to use a different operating
12:08:51 11 philosophy than US Sugar, correct?

12:08:51 12 A. Correct.

12:09:01 13 Q. And Mr. Smith, your proposed plan doesn't contemplate
12:09:05 14 an increase in Imperial refinery's overall capacity,
12:09:08 15 correct?

12:09:08 16 A. Correct.

12:09:09 17 Q. Your plan is to increase capacity utilization, right?

12:09:13 18 A. Correct.

12:09:14 19 Q. And one way you plan to do this is by increasing the
12:09:17 20 number of operating days at Imperial?

12:09:20 21 A. Correct.

12:09:20 22 Q. I would like to bring back up on the screen what has
12:09:24 23 already been entered in evidence as JTX 035. And this is
12:09:24 24 the proposed post transaction plan you were discussing,
12:09:32 25 correct?

Smith - cross

12:09:33 1 A. Correct.

12:09:33 2 Q. All right. Let's move to page 11. Can you see at
12:09:40 3 the top sir, it says operating days?

12:09:43 4 A. I do.

12:09:44 5 Q. Underneath that there is a box that says Port
12:09:47 6 Wentworth refinery over the last five years, do you see
12:09:49 7 that?

12:09:49 8 A. I do.

12:09:50 9 Q. From 2017 to at least 2020, Imperial itself has been
12:09:51 10 increasing the number of operating days at Port Wentworth,
12:09:51 11 correct?

12:09:51 12 A. Yes.

12:10:01 13 Q. In 2020, Imperial operated 345 days, right?

12:10:07 14 A. Correct.

12:10:08 15 Q. You mentioned on direct and it's stated in your
12:10:11 16 report that your stated goal is to increase the number of
12:10:14 17 operating days to 355. Correct?

12:10:16 18 A. Correct.

12:10:18 19 Q. Mr. Smith, you do not expect to run Imperial 355 days
12:10:24 20 a year within the first year of post-transaction, right?

12:10:27 21 A. No, we intend to increase it over three years.

12:10:30 22 Q. And actually during your deposition you said it would
12:10:32 23 be a stretch goal to achieve 355 days a year within five
12:10:32 24 years post close, right?

12:10:42 25 A. Yes.

Smith - cross

12:10:43 1 Q. Mr. Smith, you did not discuss with anyone at
12:10:48 2 Imperial whether operating 355 days a year would be
12:10:52 3 feasible, right?

12:10:52 4 A. Right.

12:10:53 5 Q. You don't know whether Imperial is independently
12:10:56 6 planning to increase its operating days, correct?

12:10:59 7 A. Correct.

12:11:00 8 Q. All right. Let's turn now to the exhibit, it's going
12:11:05 9 to page 15, appendix A. We'll have to blow that up a bit.
12:11:20 10 This is a CapEx plan for Imperial that you put together,
12:11:25 11 right?

12:11:26 12 A. Yes.

12:11:27 13 Q. And most of the capital expenditures in the areas of
12:11:31 14 spend are described as sustaining capital right?

12:11:36 15 A. Yes.

12:11:36 16 Q. You understand sustaining capital to be capital used
12:11:40 17 to replace or repair existing capital, right?

12:11:43 18 A. Existing equipment, yes.

12:11:45 19 Q. Existing equipment, thank you. And so sustaining
12:11:49 20 capital is something like maintenance, correct?

12:11:52 21 A. Sustaining capital is replacing things that already
12:12:01 22 exist that are worn out or reached the end of their life,
12:12:04 23 that is usually how sustaining capital is defined.

12:12:07 24 Q. Mr. Smith, Imperial's capital plan that Imperial put
12:12:11 25 together, that served as the basis for the plan that you put

Smith - redirect

12:12:14 1 together for Imperial, right?

12:12:15 2 A. Correct.

12:12:16 3 Q. Mr. Smith, you believe US Sugar can implement this
12:12:19 4 plan because Imperial has all the people in place, the
12:12:22 5 engineers, the knowledge, and the know-how to do the
12:12:26 6 projects that you've identified, correct?

12:12:31 7 A. I believe -- yes, correct.

12:12:35 8 MS. PEARL: Thank you, Your Honor. No further
12:12:36 9 questions.

12:12:36 10 THE COURT: Thank you. Any redirect?

12:12:36 11 MS. REEVES: Very briefly.

12:12:41 12 REDIRECT EXAMINATION

12:12:45 13 BY MS. REEVES:

12:12:46 14 Q. Mr. Smith, there was a beet freeze in 2019 to 2020,
12:12:50 15 correct?

12:12:51 16 A. Correct.

12:12:51 17 Q. And do you know Imperial's CEO just testified that
12:12:56 18 Imperial ran those years at an unusually high level?

12:12:56 19 A. I am not aware of his testimony.

12:13:00 20 MS. REEVES: No further questions. Thank you
12:13:05 21 Your Honor.

12:13:05 22 THE COURT: Thank you. Thank you, sir. You're
12:13:08 23 excused.

12:13:08 24 What's next?

12:13:12 25 MS. GIORDANO: Your Honor, defendant call

Fesco - direct

12:13:20 1 Dr. Barbara Fesco from the United States Department of
12:13:25 2 Agriculture.

12:13:34 3 COURT CLERK: Please raise your right hand.
12:13:44 4 Please state and spell your full name for the record.

12:13:55 5 THE WITNESS: Barbara Fesco. B-A-R-B-A-R-A. F
12:14:03 6 as in frank, E, C as in cat, S as in Sam, O.

12:14:09 7 BARBARA FECSEO, having been duly sworn, was
12:14:15 8 examined and testified as follows:

12:14:18 9 MS. GIORDANO: May I proceed, Your Honor?

12:14:23 10 THE COURT: Please.

12:14:24 11 DIRECT EXAMINATION

12:14:24 12 BY MS. GIORDANO:

12:14:25 13 Q. Good morning, Dr. Fesco.

12:14:26 14 A. Hi.

12:14:27 15 Q. We have met once before virtually when I took your
12:14:30 16 deposition in the case, is that right?

12:14:31 17 A. Yes.

12:14:32 18 Q. Nice to see you in person.

12:14:33 19 A. Yes.

12:14:34 20 Q. Where do you currently work?

12:14:35 21 A. I work at USDA.

12:14:37 22 Q. That's the United States Department of Agriculture?

12:14:38 23 A. Yes.

12:14:40 24 Q. And what is your current title?

12:14:42 25 A. I am the commodity analysis branch chief of the

Fesco - direct

12:14:47 1 **economic and policy analysis division of farm production and**
12:14:55 2 **conservation business officer of USDA.**

12:14:57 3 Q. **And you are a Ph.D. economist, is that right?**

12:15:00 4 A. **Yes.**

12:15:01 5 Q. **When did you get your Ph.D.?**

12:15:02 6 A. **1994.**

12:15:03 7 Q. **And what do you consider to be your area of**
12:15:06 8 **expertise?**

12:15:07 9 A. **Policy and resource economics.**

12:15:11 10 Q. **You focus on agricultural policy in particular?**

12:15:15 11 A. **Yes.**

12:15:15 12 Q. **How long have you worked at the USDA?**

12:15:17 13 A. **Since 1994.**

12:15:19 14 Q. **About thirty years?**

12:15:21 15 A. **Almost, yes.**

12:15:23 16 Q. **And how long have you worked on sugar in particular?**

12:15:26 17 A. **Since 2002.**

12:15:28 18 Q. **Twenty years?**

12:15:29 19 A. **Yes.**

12:15:30 20 Q. **And you're familiar of course with something you**
12:15:32 21 **heard a lot about in this case so far called the Federal**
12:15:33 22 **Sugar Program?**

12:15:33 23 A. **Yes.**

12:15:34 24 Q. **That's a program that's been in place since at least**
12:15:41 25 **as far back as the 1981 Farm Bill?**

Fesco - direct

12:15:44 1 A. Yes.

12:15:44 2 Q. We'll get into the details of it in a little bit, I
12:15:47 3 promise, but at a high level, the Federal Sugar Program,
12:15:51 4 that's a series of tools that the USDA has that allows you
12:15:56 5 to control the amount of raw and refined sugar that's
12:15:59 6 available for sale in the U.S. markets?

12:16:01 7 A. Yes.

12:16:02 8 Q. And during your time at USDA, what responsibilities
12:16:05 9 have you had for the Federal Sugar Program?

12:16:08 10 A. My responsibilities include collecting and publishing
12:16:14 11 data from beet and cane processors and cane refiners on a
12:16:18 12 monthly basis. Using that data to forecast supply and
12:16:24 13 demand variables for the WASDE, the World Agriculture Supply
12:16:28 14 and Demand Estimate report which is put out monthly. And
12:16:32 15 then using the results of that and other things to advise
12:16:35 16 the under secretaries on whether we need to take action to
12:16:39 17 rebalance the sugar market.

12:16:41 18 Q. You mentioned the WASDE, the monthly WASDE report, is
12:16:46 19 it fair to say that's one of the most closely watched USDA
12:16:50 20 publications in the sugar industry?

12:16:52 21 A. It is up there with some of the others, yes.

12:16:54 22 Q. You said one of your responsibilities is to make
12:16:57 23 recommendations to the undersecretaries about whether to
12:17:00 24 increase the supply of sugar in the U.S.; is that right?

12:17:04 25 A. Yes.

Fesco - direct

12:17:04 1 Q. And in order to make informed recommendations about
12:17:08 2 that, do you feel you need to have sort of a very detailed
12:17:12 3 understanding of the domestic and foreign influences on the
12:17:17 4 sale of sugar in the U.S.?

12:17:18 5 A. Yes, I do.

12:17:19 6 Q. And as part of your job, do you regularly talk to all
12:17:23 7 different participants in the sugar industry, sellers,
12:17:27 8 buyers, analysts?

12:17:29 9 A. I -- yes, I talk to all sides of industry
12:17:34 10 participants.

12:17:34 11 Q. Regularly, right?

12:17:37 12 A. Yes.

12:17:37 13 Q. Is it fair to say that over your lengthy career at
12:17:41 14 USDA you acquired an extremely detailed understanding of how
12:17:44 15 the domestic sugar industry operates?

12:17:48 16 A. Yes, definitely.

12:17:50 17 Q. And fair to say that you have a very detailed
12:17:52 18 understanding of how USDA operates the sugar program?

12:17:54 19 A. Yes.

12:17:57 20 Q. Is there anyone today that works at USDA that has a
12:18:00 21 longer continuous tenure working on the sugar program than
12:18:05 22 you?

12:18:06 23 A. In the capacity of making recommendations to the
12:18:10 24 undersecretaries, no.

12:18:12 25 Q. Now, Dr. Fesco, you're aware that the Department of

Fesco - direct

12:18:17 1 Justice has sued to block US Sugar's acquisition of Imperial
12:18:21 2 based primarily on a concern that the merged company is
12:18:25 3 going to be able to raise prices in a particular geographic
12:18:29 4 area they call the southeast, right?

12:18:31 5 A. Yes.

12:18:32 6 Q. Now based on your lengthy tenure at USDA and your
12:18:36 7 experience in the industry, do you believe that US Sugar's
12:18:39 8 acquisition of Imperial will have a negative impact on the
12:18:43 9 domestic sugar industry?

12:18:45 10 A. I believe there is potential for the merger to have a
12:18:49 11 positive impact on the industry.

12:18:51 12 Q. Can you explain why that is?

12:18:54 13 A. Explain why that is? Yes.

12:19:01 14 THE COURT: And do so in terms that we can
12:19:04 15 understand.

12:19:05 16 THE WITNESS: Yes. Talking to the owners, or
12:19:09 17 the potential parties that would be involved, they told me
12:19:15 18 about their plans. I seen that there could be efficiency.
12:19:21 19 There is a potential for Florida to send supplies of raw
12:19:27 20 sugar to Imperial. Right now Imperial doesn't have a
12:19:32 21 domestic source of sugar. There is a potential for another
12:19:37 22 voice to be heard besides Imperial Sugar when they come to
12:19:42 23 USDA and ask for us to increase imports to relieve tightness
12:19:47 24 in the raw market.

12:19:50 25 And because of the efficiencies that I see are

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12:19:54 1 possible with this merger, the engineers, for instance, from
12:19:59 2 US Sugar revitalizing the Imperial facility, things like
12:20:04 3 that, there could be cost savings and those cost savings
12:20:09 4 could result in lower refined prices.

12:20:15 5 Q. So you mentioned that you understand that US Sugar
12:20:19 6 intends to send raw sugar grown by its farmers in Florida up
12:20:24 7 to the Imperial plant to be refined; right?

12:20:27 8 A. Yes.

12:20:27 9 Q. And one of the consequences you just mentioned about
12:20:32 10 that is that Imperial could have a domestic source of raw
12:20:37 11 supply for its plant, right?

12:20:39 12 A. Yes.

12:20:39 13 Q. Focusing on that in particular, what is the
12:20:41 14 consequence of that in your view?

12:20:44 15 A. Well, it would be another source of supply for
12:20:48 16 Imperial, so if it had more sugar coming from the domestic
12:20:53 17 source, it my relieve their need to import as much.

12:20:59 18 Q. And do you believe that would have any impact on the
12:21:02 19 prices at which Imperial -- United might be able to sell
12:21:07 20 sugar out of the Imperial plant?

12:21:09 21 A. I think there is potential for this merger to result
12:21:15 22 in cost savings for the Imperial facility which would give
12:21:19 23 them the potential to lower their refined sugar price that
12:21:23 24 they're offering in the market.

12:21:25 25 Q. Do you believe that if this transaction is allowed to

Fesco - direct

12:21:30 1 conclude, that it is likely to lead to higher sugar prices
12:21:34 2 anywhere in the U.S.?

12:21:36 3 A. I think the likelihood is -- that prices could in
12:21:42 4 fact be lowered.

12:21:43 5 Q. In the event that prices were to increase as a result
12:21:47 6 of this transaction, would you expect there to be a supply
12:21:53 7 response from other sugar suppliers to bring those prices
12:21:57 8 back down?

12:21:58 9 A. If prices -- if Imperial and United decided to raise
12:22:05 10 prices, it would attract the attention of other producers in
12:22:09 11 the country and sugar would flow in and compete at lower
12:22:13 12 prices to get that business.

12:22:15 13 Q. And that's even if USDA didn't do anything, is that
12:22:19 14 right?

12:22:19 15 A. Right. There is market forces that could cause sugar
12:22:23 16 to flow to areas of tightness and compete at high prices,
12:22:27 17 yes.

12:22:27 18 Q. And if for some reason those supply responses for
12:22:31 19 those competitors were not sufficient by themselves to bring
12:22:35 20 the prices back down, do you agree that USDA has the
12:22:40 21 regulatory tools in place at its disposal to bring those
12:22:44 22 prices back down?

12:22:47 23 A. Yes, USDA has a set of tools it can use to bring in
12:22:51 24 more sugar to get prices down.

12:22:52 25 Q. Let's talk a little bit more about the factual basis

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12:22:59 1 behind those opinions you just gave. So from your many
12:23:05 2 years of experience in the industry, is it fair to say that
12:23:09 3 you're very familiar with the suppliers of sugar in the
12:23:13 4 industry?

12:23:13 5 A. Yes.

12:23:13 6 Q. Do you consider it part of your job to have a very
12:23:16 7 good understanding of who is competing with who and where?

12:23:19 8 A. I like to know as much as possible about the
12:23:21 9 interactions between companies. I'm not one to just look at
12:23:25 10 numbers on a page and make -- draw conclusions, I need more
12:23:30 11 information from that to inform my leaders' decisions.

12:23:31 12 Q. And I take it it's also part of your job to
12:23:34 13 understand how sugar moves around the country, right?

12:23:39 14 A. Yes.

12:23:40 15 Q. And based on your experience, do you agree that sugar
12:23:44 16 flows from areas in the US that have excess sugar to areas
12:23:49 17 where they need more sugar?

12:23:52 18 A. You would think so, yes.

12:23:54 19 Q. You have seen that happen, right?

12:23:56 20 A. Well, price, if there is a shortage of sugar the
12:24:00 21 price will go up and that will attract available sugar from
12:24:04 22 other sources to that area.

12:24:06 23 Q. And in fact, what you have witnessed and what you
12:24:09 24 have seen happen is that because of those factors, it's true
12:24:12 25 that refined sugar can travel pretty long distances from

Fesco - direct

12:24:20 1 where it's produced to where it's actually used?

12:24:22 2 A. Yes, I know that to exist.

12:24:24 3 Q. I think the way you describe it to me in your
12:24:28 4 deposition was that refined sugar goes where the market
12:24:31 5 wants it to go. Is that how you think about it?

12:24:33 6 A. Yes.

12:24:34 7 Q. Another way you describe it to me was that the cure
12:24:38 8 for high prices is basically high prices, right?

12:24:41 9 A. Yes.

12:24:42 10 Q. And what you meant by that is when somebody tries to
12:24:47 11 raise prices, competitors are going to react, they're going
12:24:50 12 to be attracted by those high prices, they're going to come
12:24:54 13 in and bring those prices right back down, right?

12:24:56 14 A. Yes.

12:24:56 15 Q. And that's something you witnessed time and time
12:24:59 16 again in all your years in the sugar industry?

12:25:01 17 A. Yes.

12:25:01 18 Q. And again, even if USDA itself takes no action at
12:25:04 19 all, that's just how the market operates?

12:25:11 20 A. Yes, market forces work to redistribute sugar to
12:25:15 21 where it's needed, yes.

12:25:18 22 Q. Now, when the USDA is thinking about taking certain
12:25:22 23 actions under the sugar program, you would typically think
12:25:26 24 about the market, sort of nationally in the aggregate,
12:25:29 25 right?

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12:25:29 1 A. Yes.

12:25:30 2 Q. And, again, the reason why you think about it sort of
12:25:33 3 nationally in the aggregate is because of what we have been
12:25:36 4 talking about, sugar flows where it needs to go, right?

12:25:39 5 A. Yes.

12:25:39 6 Q. And you have become familiar with Imperial based on
12:25:44 7 your work at USDA?

12:25:46 8 A. Very, yes.

12:25:47 9 Q. Of course as you talked about earlier, you know that
12:25:49 10 Imperial doesn't have much of a domestic source of supplied
12:25:51 11 sugar so it has to depend on imports of foreign raws, right?

12:25:57 12 A. Yes.

12:25:58 13 Q. And in your experience, if USDA doesn't bring in
12:26:01 14 enough of the low cost foreign raws, what's the consequence
12:26:04 15 of that for the prices at which Imperial can sell sugar?

12:26:12 16 A. If we do not bring in enough raw supplies, the price
12:26:18 17 will go up. And if it goes up high enough to cause
12:26:22 18 high-tier imports to come in, Imperial might resort to
12:26:26 19 buying foreign sugar and paying the extra duty. In order to
12:26:29 20 maintain their profit margins, they would have to raise the
12:26:32 21 price that they sell into the marketplace.

12:26:34 22 Q. And based on all the various market participants that
12:26:40 23 you talk to regularly and all the monitoring that you do of
12:26:44 24 all the factors in the industry, is it correct to
12:26:47 25 characterize Imperial as a low price seller who is out there

Fesco - direct

12:26:52 1 today driving down the price of sugar?

12:26:55 2 A. No, I don't consider -- they are a price setter, if
12:27:00 3 anything.

12:27:00 4 Q. What the you mean by that, is they're the high price
12:27:04 5 supplier?

12:27:05 6 A. Yes.

12:27:05 7 Q. Let's talk a little bit more about the sugar program.
12:27:09 8 And again, at least since 1981, the Farm Bill, there has
12:27:13 9 been this policy in place in our country to support American
12:27:17 10 farmers, including American sugar farmers, right?

12:27:21 11 A. Yes, that's the idea behind the loan program is to
12:27:25 12 support the price.

12:27:26 13 Q. And that federal policy reflects a judgment that we
12:27:29 14 as a country, we want to try to protect the domestic food
12:27:34 15 supplies that the American farmers provide, right?

12:27:37 16 A. Well, that's not exactly in our mandate, but the idea
12:27:41 17 is guaranteed floor prices to producers.

12:27:47 18 Q. Well, the reason -- we'll talk about that floor for a
12:27:51 19 minute. The reason that the sugar program use USDA tools to
12:27:55 20 control the supply, because it's a matter of economics,
12:27:59 21 that's one way to control price, right?

12:28:01 22 A. Yes.

12:28:02 23 Q. And if you restrict the amount of sugar that's
12:28:06 24 available for sale, you can keep those prices high enough
12:28:09 25 above that floor so that the farmers can get enough money

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12:28:11 1 for their crops, right?

12:28:12 2 A. Yes.

12:28:12 3 Q. I'm sorry?

12:28:13 4 A. Yes.

12:28:14 5 Q. And, in fact, conversely, if you increase supply,
12:28:18 6 that can cause prices to come down?

12:28:20 7 A. Yes.

12:28:21 8 Q. The basic economics of supply and demand, right?

12:28:26 9 A. Yes.

12:28:27 10 Q. Now, while USDA is certainly focused on maintaining
12:28:31 11 that price floor, you're also mindful of not letting prices
12:28:37 12 get too high, too, right?

12:28:40 13 A. In most cases, yes.

12:28:42 14 Q. And that's because the other side of the equation
12:28:45 15 from the farmers, are the sugar buyers who need to acquire
12:28:50 16 sugar to make all the sweetened products that we have in
12:28:55 17 this country right?

12:28:56 18 A. We do try to balance the demand of suppliers and
12:29:00 19 buyers.

12:29:00 20 Q. The sugar buyers are sometimes called sugar users?

12:29:04 21 A. Yes.

12:29:04 22 Q. And sugar users, you based on people that you have
12:29:08 23 talked to, you know that they want to try to keep their
12:29:11 24 costs down so they generally want their sugar to be as low
12:29:15 25 of a price as they can get it, right?

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12:29:17 1 A. If I were a buyer, I would want to be able to get the
12:29:22 2 sugar that I need, at the quality that I need, at the time
12:29:26 3 that I need it, at the lowest price.

12:29:30 4 Q. So on the one hand there is the federal policy to
12:29:33 5 keep a price floor for the farmers, make sure that they can
12:29:37 6 get enough money and on the other hand you got the sugar
12:29:40 7 users who want to keep prices lower and it's USDA's job to
12:29:45 8 try to strike that right balance, is that right?

12:29:47 9 A. Our job is to maintain adequate supplies of raw and
12:29:51 10 refined sugar, that's our mandate.

12:29:53 11 Q. And in order to do that, one of the things you do in
12:29:58 12 order to make adequate supplies is you try to balance the
12:30:02 13 supply and demand dynamics, is that right?

12:30:05 14 A. Yes.

12:30:05 15 Q. Based on your experience, it's true that sugar users
12:30:08 16 are often lobbying USDA to do things that are going to bring
12:30:13 17 in more supplies, increase supplies, right?

12:30:15 18 A. We get letters from users and sellers.

12:30:18 19 Q. And the reason they want you to bring in more supply
12:30:22 20 is because they think that's going to keep the price of
12:30:25 21 sugar lower, right?

12:30:28 22 A. Yes.

12:30:28 23 Q. And you mentioned just a minute ago, but part of the
12:30:31 24 USDA's sugar program mandate is to ensure there are adequate
12:30:34 25 supplies of raw and refined sugar in the US?

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12:30:39 1 A. Right. Yes.

12:30:40 2 Q. At least during your time at USDA, that mandate has
12:30:44 3 been interpreted at least implicitly to require the concept
12:30:49 4 that sugar prices should be reasonable; is that right?

12:30:56 5 A. Reasonable prices is embedded in the idea of adequate
12:31:01 6 supplies, yes.

12:31:02 7 Q. Because one way to determine whether supplies are
12:31:05 8 adequate is to look at what's happening with prices, right,
12:31:09 9 that's one way to look at it?

12:31:11 10 A. That is one way to look at it.

12:31:12 11 Q. And if USDA believes that prices are too high, that
12:31:16 12 can be an indication that supplies are not adequate and that
12:31:20 13 there may be more supply needed, is that right?

12:31:24 14 A. Well, you said if USDA believes. I am not the
12:31:31 15 decision maker, I don't know what they believe. I make
12:31:37 16 recommendations based on data, and I have my own feelings
12:31:41 17 about supply and demand.

12:31:44 18 Q. Let me ask you then as someone who has done this for
12:31:47 19 the last 20 years, if you in making your recommendation, you
12:31:51 20 believe that prices are too high, that's an indication to
12:31:54 21 you that maybe more supply is needed and that might inform a
12:31:57 22 recommendation to bring in more supply, is that right?

12:32:00 23 A. Yes.

12:32:01 24 Q. And it's true that during your tenure at USDA what
12:32:04 25 you have witnessed and what you have seen is that the

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12:32:07 1 various administrations, they have managed the Federal Sugar
12:32:11 2 Program to ensure that there are adequate supplies available
12:32:14 3 at reasonable prices with each administration determining
12:32:17 4 what it believes are reasonable; is that right?

12:32:20 5 A. Yes. And adequate.

12:32:23 6 Q. Okay. You should have a binder in front of you, it's
12:32:27 7 the black binder with the defendants' name on top of it.
12:32:30 8 Yeah, that's the other one. There you go. Can you turn in
12:32:35 9 that binder to tab DTX 278.

12:32:45 10 A. Okay.

12:32:45 11 Q. Are you there?

12:32:46 12 A. Yes.

12:32:46 13 Q. Dr. Fesco, you have seen letters like this before,
12:32:50 14 right?

12:32:50 15 A. Yes.

12:32:51 16 Q. These are letters that the secretary, the highest
12:32:54 17 position at USDA sends in response to -- to somebody this
12:33:00 18 happens to be the National Confectioners Association, the
12:33:03 19 USDA sends it to response to people who are asking for
12:33:07 20 certain actions to be taken in response to the Federal Sugar
12:33:10 21 Program, right?

12:33:11 22 A. Yes.

12:33:12 23 Q. And you yourself have drafted some of these letters
12:33:14 24 over your career?

12:33:15 25 A. Many.

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12:33:16 1 Q. This is just an example here we see the secretary of
12:33:18 2 the USDA stating please be assured the US Department of
12:33:24 3 Agriculture will work to diligently represent the interests
12:33:27 4 of all our stake holders and manage the program to provide
12:33:30 5 adequate supplies of both raw and refined sugar at
12:33:34 6 reasonable prices. Is that right?

12:33:35 7 A. Yes.

12:33:37 8 Q.

12:33:38 9 MS. GIORDANO: Your Honor I move to admit DTX
12:33:40 10 278 as evidence.

12:33:41 11 THE COURT: Any objection? Any objection?

12:33:45 12 MR. THORNBURGH: No objection. Sorry.

12:33:47 13 THE COURT: All right. It's admitted.

12:33:49 14 (DTX Exhibit No. 278 was admitted into
12:33:50 15 evidence.)

12:33:50 16 BY MS. GIORDANO:

12:33:51 17 Q. Dr. Fesco, one of the indicators that USDA uses to
12:33:55 18 determine whether supplies are adequate is something called
12:33:58 19 the stocks-to-use ratio?

12:33:59 20 A. That's one of the most important things, yes.

12:34:00 21 Q. Can you explain what that is?

12:34:02 22 A. Okay. So we -- USDA puts out a monthly report called
12:34:04 23 the world A G supply and demand estimates and they put it
12:34:10 24 out for sugar. In that report it lists the sugar team
12:34:12 25 within USDA's realm, it list their forecast for the fiscal

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12:34:24 1 year of certain supply variables, certain demand variables.
12:34:29 2 So supplies is equal to beginning stock which are the
12:34:33 3 aggregate, across beet and cane processors, cane refiners,
12:34:38 4 plus their total production forecast, plus any imports that
12:34:43 5 are forecast for that fiscal year, those three things add up
12:34:47 6 to total supply and then there is several use categories
12:34:54 7 that equal total use, so supply minus use equal ending stock
12:35:00 8 and you divide that by total used and that is your
12:35:03 9 stock-to-use ratio for the year, the forecast.

12:35:06 10 Q. As a general matter, does the higher stock-to-use
12:35:09 11 ratio signal that there is more supply available in the
12:35:13 12 marketplace and thus prices are generally lower?

12:35:16 13 A. Normally, yes.

12:35:19 14 Q. And again, as a general matter, does a lower
12:35:23 15 stock-to-use ratio signal that supplies are tighter and
12:35:26 16 prices are a little bit higher?

12:35:29 17 A. Yes.

12:35:32 18 Q. And typically what range of stocks-to-use ratio does
12:35:35 19 USDA manage the sugar program to try to maintain?

12:35:38 20 A. USDA tries to manage -- between a 13-and-a-half and
12:35:41 21 15-and-a-half percent stock to use ratio.

12:35:44 22 Q. And although there certainly are sections to this, I
12:35:47 23 understand, but as a general matter it's true that when the
12:35:50 24 stocks-to-use ratio is between that 13-and-a-half and
12:35:53 25 15-and-a-half percent range, USDA typically considers the

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12:35:57 1 prices that result from that range to be reasonable; is that
12:36:01 2 right?

12:36:01 3 A. Well, there are aberrations, but usually historically
12:36:07 4 when -- the stocks to use were below 13-and-a-half percent,
12:36:12 5 we would get high-tier imports and if they were above
12:36:16 6 15-and-a-half percent, a greater likelihood of forfeiture,
12:36:20 7 so between that 13-and-a-half to 15-and-a-half we had a safe
12:36:26 8 range of prices.

12:36:27 9 Q. Now, the range of stocks to use of 13-and-a-half to
12:36:31 10 15-and-a-half, that's not in a statute somewhere, right?

12:36:35 11 A. No, it was adopted back in the late 1990s.

12:36:38 12 Q. That's something USDA could change if it wants to?

12:36:41 13 A. Yeah, I mean, they could change their approach.
12:36:45 14 There is nothing to change. Not in stone or written
12:36:50 15 anywhere.

12:36:51 16 Q. And it's true, isn't it, even over your career, even
12:36:55 17 when the stocks-to-use ratio has been between that range of
12:36:58 18 13-and-a-half and 15-and-a-half, there have been times when
12:37:01 19 USDA has still brought in more supply even when you are in
12:37:04 20 range right?

12:37:07 21 A. Yes.

12:37:07 22 Q. And USDA doesn't rigidly adhere to stocks to use
12:37:11 23 ratio as the only metrics to consider when it's thinking
12:37:14 24 about taking action under the sugar program, right?

12:37:17 25 A. No, there are many other factors to consider.

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12:37:22 1 Q. And one of those is what is happening with prices,
12:37:24 2 right?

12:37:25 3 A. Yes.

12:37:25 4 Q. Now, when USDA believes that are additional supplies
12:37:30 5 that are needed in the marketplace, it has a variety of
12:37:32 6 tools at its disposal that it can use, correct?

12:37:35 7 A. Correct.

12:37:36 8 Q. And one set of those tools that you can use to
12:37:38 9 increase the volume of sugar -- let me start again. One set
12:37:42 10 of tools allows USDA to increase the volume of sugar that
12:37:47 11 domestic processors are allowed to sell; is that right?

12:37:50 12 A. Yes.

12:37:51 13 Q. And those are a set of tools that are known as the
12:37:53 14 domestic marketing allotments?

12:37:56 15 A. Yes.

12:37:56 16 Q. And marketing allotments, what those do is they place
12:37:59 17 a legal limit on the amount of sugar that domestic
12:38:03 18 processors are allowed to sell, is that right?

12:38:06 19 A. Yes.

12:38:07 20 Q. However, what USDA determines that additional
12:38:12 21 supplies are needed, you have the power to increase those
12:38:14 22 allotments, right?

12:38:17 23 A. Yes, it only works if they have more sugar to sell.

12:38:21 24 Q. Well, a recent example of that happened just this
12:38:24 25 past December, right?

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12:38:24 1 A. Yes.

12:38:25 2 Q. Can you turn in your binder to tab DTX 464.

12:38:32 3 A. Okay.

12:38:33 4 Q. And this is an announcement that USDA put out on
12:38:39 5 December 21, 2021. Do you recall that?

12:38:41 6 A. Yes.

12:38:41 7 Q. And you were critically involved in this
12:38:44 8 announcement, right?

12:38:46 9 A. Yes.

12:38:46 10 Q. And this is an example of USDA increasing marketing
12:38:50 11 allotment in particular to allow beet processors to sell
12:38:54 12 more sugar; is that right?

12:38:56 13 A. Yes, I had beet processors that were blocked from
12:38:59 14 selling all their expected supply.

12:39:02 15 Q. And by that, you meant they had more they could sell
12:39:05 16 but the allotment prevented them from doing so?

12:39:08 17 A. Yes.

12:39:09 18 Q. Can you turn to page 2, at the top of page 2 in the
12:39:13 19 top paragraph there. What we see here is that in that sort
12:39:17 20 of first sentence there, is the reason or one of the reasons
12:39:20 21 USDA took this action was specifically because there were
12:39:22 22 current high sugar prices. Do you see that?

12:39:23 23 A. That's what it says, yes.

12:39:30 24 Q. And USDA intended that increasing supply here might
12:39:32 25 help with those current high sugar prices, right?

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12:39:40 1 A. That's what it says, yes, speaks for itself.

12:39:44 2 Q. And this exhibit shows that one of the beet
12:39:47 3 processors, if we can go down on to the chart that was
12:39:50 4 particularly benefitted by this action at the time was a
12:39:54 5 company called Michigan Sugar?

12:39:56 6 A. Yes.

12:39:56 7 Q. And Michigan Sugar is a beet processor?

12:40:00 8 A. Yes.

12:40:00 9 Q. Before USDA took this action, Michigan Sugar was not
12:40:04 10 able to sell as much sugar as it wanted to because it was
12:40:08 11 bumping up against its marketing allotment?

12:40:11 12 A. Yes.

12:40:11 13 Q. And this action by USDA, it allowed Michigan Sugar to
12:40:17 14 sell more?

12:40:17 15 A. Yes.

12:40:19 16 MS. GIORDANO: I move to admit, Your Honor, DTX
12:40:21 17 464 into evidence.

12:40:23 18 MR. THORNBURGH: No objection.

12:40:24 19 THE COURT: Thank you. It's admitted.

12:40:25 20 (DTX Exhibit No. 464 was admitted into
12:40:26 21 evidence.)

12:40:26 22 BY MS. GIORDANO:

12:40:27 23 Q. Dr. Fesco, let's talk about imports if we can. The
12:40:30 24 other set of tools that USDA has to increase supplies if you
12:40:32 25 think it's necessary relate to USDA's control over sugar

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12:40:38 1 imports, correct?

12:40:40 2 A. Yes.

12:40:40 3 Q. Is it true that there are about forty countries in
12:40:43 4 the world that produce sugar that can be imported into the
12:40:46 5 US?

12:40:47 6 A. Under the WTO, yes.

12:40:49 7 Q. You understand there are some special rules for some
12:40:53 8 other countries, like Mexico?

12:40:53 9 A. And then there is TRQs, too.

12:40:55 10 Q. Is it true in any given marketing year there is
12:40:58 11 typically lots of available sugar out there that can be
12:41:01 12 imported into the U.S.?

12:41:02 13 A. Well, sometimes the world has -- is in deficit so
12:41:08 14 it's not always the case.

12:41:10 15 Q. Is it generally the case that there is sugar always
12:41:13 16 available for import?

12:41:14 17 A. US has the highest price market in the world. These
12:41:18 18 other countries have surplus. They would love to send it to
12:41:21 19 us instead of some lower price country.

12:41:24 20 Q. As a general matter is it true that the price of
12:41:27 21 sugar that's available on the world market, is it typically
12:41:29 22 lower than U.S. prices like you just said?

12:41:32 23 A. Yes.

12:41:32 24 Q. Is it typically sometimes can be much lower?

12:41:35 25 A. Yes.

Fesco - direct

12:41:37 1 Q. And so if the U.S. were to allow all of that lower
12:41:40 2 priced foreign sugar into the country, that could cause U.S.
12:41:44 3 prices to plummet, right?

12:41:47 4 A. It could drag down to US industry.

12:41:51 5 Q. That could be a problem for your federal sugar policy
12:41:55 6 because that could cause the prices for domestic processors,
12:41:58 7 domestic farmers to fall below that floor that you have
12:42:03 8 created, right?

12:42:04 9 A. Yes.

12:42:04 10 Q. And to protect against that, what we have done is
12:42:08 11 we've created as a country a structure that limits the
12:42:11 12 amount of foreign imports that can come in, right?

12:42:14 13 A. Yes.

12:42:14 14 Q. And a system of tariff rate quotas, that's one of the
12:42:19 15 major strategy to limit the amount of imports that can come
12:42:23 16 in?

12:42:23 17 A. Yes.

12:42:23 18 Q. And tariff rate quotas sometimes know as TRQ?

12:42:27 19 A. Yes.

12:42:27 20 Q. What is a tariff rate quota is is a quantity of sugar
12:42:32 21 that can be imported into the country at a low duty or no
12:42:36 22 duty?

12:42:36 23 A. Yes.

12:42:36 24 Q. In fact, unlimited amounts of sugar can be imported
12:42:40 25 into the country, but anything that comes in above the TRQ

Fesco - direct

12:42:43 1 amount, that's much more expensive, right, subject to a
12:42:47 2 higher duty?

12:42:48 3 A. Yes.

12:42:49 4 Q. And that amount that comes in above the TRQ amount,
12:42:53 5 that's a Tier II sugar or high-tier sugar?

12:42:56 6 A. Yes, but we also have the Mexican amounts, separate.

12:43:01 7 Q. I'm going to get to Mexico in one second, but thank
12:43:04 8 you for that.

12:43:04 9 Is it fair to say that because TRQ sugar,
12:43:10 10 because it enters at a low or no duty that it can be a
12:43:13 11 pretty effective price constraint in the US marketplace?

12:43:14 12 A. Yes, I would say so.

12:43:21 13 Q. Now, USDA has the ability to increase the amount of
12:43:27 14 TRQ sugar that come over into the country over the course of
12:43:32 15 a marketing year?

12:43:33 16 A. Yes. We have rules in the sugar program to bring in
12:43:36 17 more TRQ imports.

12:43:38 18 Q. And you can increase TRQ imports for both raw and
12:43:41 19 refined sugar?

12:43:42 20 A. Yes.

12:43:43 21 Q. Now, one of the reasons that USDA might increase TRQs
12:43:46 22 during a particular year is because it perceives that
12:43:50 23 additional imports are needed to maintain adequate supply at
12:43:53 24 reasonable prices, right?

12:44:00 25 A. Yes.

Fesco - direct

12:44:01 1 Q. And, in fact, the harmonized tariff schedule which
12:44:06 2 governs the TRQ, that schedule expressly says USDA can bring
12:44:11 3 in more imports whenever it believes that additional
12:44:15 4 supplies may be needed at adequate prices, right?

12:44:19 5 A. It is discretionary.

12:44:24 6 Q. Now, if companies in the US are importing significant
12:44:28 7 quantities of TRQ sugar, that's typically because domestic
12:44:33 8 prices are higher, right?

12:44:34 9 A. Typically, yes.

12:44:35 10 Q. When domestic prices rise so that they're at or above
12:44:40 11 Tier II prices, companies are likely to import more Tier II
12:44:45 12 sugar instead of buying it domestically?

12:44:48 13 A. There are exceptions, it depends on the need.

12:44:50 14 Q. That does happen still, right?

12:44:52 15 A. I got an e-mail yesterday from a trader down in
12:44:56 16 southern Illinois that was being offered \$0.60 sugar.
12:44:59 17 That's much higher than the world prices with the high-duty
12:45:02 18 right now, but that's in the world and he needed it
12:45:05 19 yesterday at that location, so higher prices can -- domestic
12:45:12 20 can trade higher than the world price plus duty.

12:45:16 21 Q. As a general matter do you agree that Tier II prices,
12:45:20 22 they can function effectively as a price ceiling right in
12:45:23 23 some circumstances?

12:45:24 24 A. Most cases, yes.

12:45:27 25 Q. Let's talk about Mexico a little bit. There are

Fesco - direct

12:45:32 1 special rules that govern imports from Mexico, right?

12:45:35 2 A. Yes.

12:45:35 3 Q. There is a long history related to this, to Mexico
12:45:38 4 and the suspension agreements, but suffice it to say there
12:45:41 5 are agreements in place called the U.S./Mexico suspension
12:45:46 6 agreement that limit the amount of sugar that can be
12:45:48 7 imported from Mexico?

12:45:50 8 A. It limits the quantity and the prices.

12:45:52 9 Q. And USDA again, you can increase those imports from
12:45:57 10 Mexico when you feel it's appropriate, right?

12:45:59 11 A. Yes, we're able to increase Mexico's export.

12:46:03 12 Q. Can you turn to tab DTX 515 in your binder. This is
12:46:17 13 USDA Sugar and Sweeteners Outlook Report from March 22, '22,
12:46:21 14 right?

12:46:21 15 A. Yes.

12:46:21 16 Q. And this is a report that USDA publishes every month
12:46:26 17 right after the WASDE comes out?

12:46:28 18 A. Yes.

12:46:31 19 Q. And you're involved in preparing these outlook
12:46:35 20 reports, right?

12:46:38 21 A. This is prepared by the Economic Research Service, I
12:46:42 22 just clear it.

12:46:42 23 Q. You review it before the report goes out?

12:46:45 24 A. Yes.

12:46:48 25 Q. And publishing things like these reports and the

Fesco - direct

12:46:48 1 monthly WASDE report, that's consistent with the USDA belief
12:46:54 2 and transparency about what's happening with supply and
12:46:58 3 demand, that's a good thing for participants in the sugar
12:47:02 4 industry, right?

12:47:02 5 A. Again, it was a decision made that yes, the industry
12:47:05 6 would like to know as much as possible about the sugar data
12:47:10 7 that we collect. So this is the result.

12:47:14 8 Q. And is it true as a general matter that USDA believes
12:47:18 9 the things like the outlook form that you do and these
12:47:21 10 publications that you make, as a general matter do you
12:47:24 11 believe that facilitating information sharing through the
12:47:27 12 USDA, that's the type of transparency that leads to a
12:47:31 13 well-functioning open market?

12:47:34 14 A. You know, some administrators are not as willing to
12:47:38 15 be transparent as others. It depends. I personally believe
12:47:41 16 that the best way to run the program is to be as transparent
12:47:44 17 as possible.

12:47:48 18 Q. Can you turn to page 23 in DTX 515. We see here, are
12:48:01 19 you there?

12:48:01 20 A. Yes.

12:48:01 21 Q. There is a special article called sugar actions at a
12:48:05 22 glance?

12:48:05 23 A. Yes.

12:48:06 24 Q. And this is describing actions that USDA has taken to
12:48:09 25 increase imports --

Fesco - direct

12:48:10 1 A. Yes.

12:48:11 2 Q. -- when it believes that more sugar is needed?

12:48:13 3 A. Yes.

12:48:13 4 Q. And it discusses a number of tools that you and I
12:48:16 5 already talked about today and some others in addition to
12:48:19 6 that?

12:48:19 7 A. Yes.

12:48:19 8 Q. If you look at the second full paragraph that we've
12:48:23 9 called out here, what we see is that USDA's management of
12:48:26 10 the sugar program is governed by several statutory
12:48:29 11 principles and that's citing the Harmonized Tariff schedule
12:48:32 12 you and I just talked about?

12:48:34 13 A. Yes.

12:48:36 14 Q. Can you turn to page 26 of this exhibit.

12:48:41 15 A. Yes.

12:48:41 16 Q. What we see here is a chart that identifies some of
12:48:44 17 the many times USDA has taken actions under the sugar
12:48:51 18 program to increase imports?

12:48:53 19 A. Yes.

12:48:54 20 Q. Now, this isn't all the actions you have taken, this
12:48:57 21 is just some of them, right?

12:48:58 22 A. No, it's not all the actions.

12:49:01 23 Q. And each of the numbers on here just so we're -- so
12:49:04 24 the Court is aware, each of those numbers reflect an amount
12:49:07 25 of additional volume that you brought in when you thought

Fesco - direct

12:49:11 1 additional supply was needed?

12:49:13 2 A. Yes.

12:49:15 3 Q. Now, what is the blue line we see on here?

12:49:19 4 A. It looks like it's the refined beet sugar price would
12:49:23 5 be a Milling & Baking price.

12:49:25 6 Q. And that's a publication by Sosland?

12:49:28 7 A. Sosland, yes.

12:49:29 8 Q. And Sosland. And it's true that Sosland is the major
12:49:33 9 source that USDA uses to track refined sugar prices, right?

12:49:34 10 A. Yes.

12:49:34 11 Q. There are a number of industry publications out there
12:49:42 12 that are the similar to Sosland that track refined prices,
12:49:47 13 right?

12:49:48 14 A. Yes.

12:49:48 15 Q. There are industry reports like JSG, Milling &
12:49:53 16 Baking, Commodity Information, and those are all things
12:49:56 17 you're familiar with?

12:49:57 18 A. There are several publications.

12:49:59 19 Q. And you reviewed these third-party reports pretty
12:50:03 20 regularly each month as part of your duties?

12:50:05 21 A. Weekly.

12:50:06 22 Q. More frequently than that?

12:50:07 23 A. Yes.

12:50:08 24 Q. And you regularly talk to the analysts that prepare
12:50:12 25 these types of third-party reports?

Fesco - direct

12:50:14 1 A. Yes.

12:50:14 2 Q. You find these reports and these conversations with
12:50:17 3 these third parties also and that's helpful for you as
12:50:20 4 you're making decisions under the Sugar Program, right?

12:50:23 5 A. It's helpful for me.

12:50:25 6 Q. And it's also true that USDA's Economic Research
12:50:29 7 Service publishes some of the Sosland prices on its website,
12:50:36 8 right?

12:50:38 9 A. The USDA puts out publications, yes, by the month,
12:50:41 10 prices, various price theories.

12:50:43 11 Q. And those -- they use Sosland as the source, right?

12:50:46 12 A. Well, for the refined beet price they also have the
12:50:51 13 raw price up, the world price, different prices.

12:50:56 14 Q. And the prices that the refined prices we're talking
12:50:59 15 about that USDA publishes from Sosland, those are what are
12:51:04 16 commonly known as spot prices?

12:51:05 17 A. Spot prices, yes.

12:51:07 18 Q. And sometimes called list prices?

12:51:09 19 A. Yes, same thing.

12:51:10 20 Q. Let's see if we can sum up what we have talked about
12:51:14 21 today. I take it that you would agree that USDA has lots of
12:51:17 22 different tools at its disposal to increase sugar supplies
12:51:22 23 if it feels that supplies are not adequate at reasonable
12:51:26 24 prices?

12:51:27 25 A. USDA has been given a set of tools to manage

Fesco - direct

12:51:31 1 supplies, yes.

12:51:32 2 Q. And these are all tools that USDA has used for just
12:51:36 3 that reason; right?

12:51:37 4 A. To make sure that no factory closes and to address
12:51:44 5 high processes, yes.

12:51:46 6 Q. And it's fair to say based on everything you know
12:51:49 7 about the people you talk to that the sugar suppliers in
12:51:52 8 this industry, they are well aware that USDA has all these
12:51:55 9 tools at its disposal to the increase supply, right?

12:51:58 10 A. Most of them. There might be a little bubble gum
12:52:01 11 company that doesn't know about us, but yes, most.

12:52:04 12 Q. And USDA has done it before and you can do it again
12:52:08 13 whenever you think it's necessary, is that right?

12:52:10 14 A. We have the set of tools that we can use at our
12:52:13 15 disposal to make decisions to increase supplies.

12:52:17 16 MS. GIORDANO: Thank you, Dr. Fesco. No further
12:52:19 17 questions.

12:52:20 18 THE COURT: All right. How long do you think
12:52:23 19 your cross is going to take?

12:52:27 20 MR. THORNBURGH: Your Honor, it would probably
12:52:29 21 be more than ten minutes if that's the question you're
12:52:31 22 getting at.

12:52:33 23 THE COURT: All right. I know you're up here
12:52:35 24 from -- is it okay if we take a thirty-minute lunch break or
12:52:37 25 do you have to be back in DC?

Fesco - cross

12:52:41 1 THE WITNESS: No, I don't have to be back. I
12:52:43 2 might never go back.

12:52:44 3 THE COURT: So let's take our thirty-minute
12:52:47 4 lunch break, or thirty-eight minutes. Let's come back at
12:52:50 5 1:30.

12:52:52 6 (A brief recess was taken.)

13:27:30 7 THE COURT: All right. Please be seated.

13:34:30 8 Cross-exam.

13:34:32 9 MS. GIORDANO: Your Honor, neglected to move the
13:34:34 10 admission of DTX 515 in evidence.

13:34:38 11 THE COURT: Any objection?

13:34:40 12 MR. THORNBURGH: No objection.

13:34:41 13 THE COURT: It's admitted.

13:34:41 14 (DTX Exhibit No. 515 was admitted into
13:34:42 15 evidence.)

13:34:42 16 MR. THORNBURGH: Good afternoon, Your Honor.
13:34:45 17 John Thornburgh for the United States. May I proceed?

13:34:48 18 THE COURT: Yes, please.

13:34:50 19 CROSS-EXAMINATION

13:34:50 20 BY MR. THORNBURGH:

13:34:52 21 Q. Good afternoon, Dr. Fesco, I hope you enjoyed your
13:34:53 22 lunch.

13:34:54 23 Dr. Fesco, did your job responsibilities at the
13:34:56 24 USDA include reviewing sugar-related transactions for
13:35:00 25 compliance with fed antitrust laws?

Fesco - cross

13:35:04 1 A. No.

13:35:04 2 Q. And more generally, Dr. Fesco, what is your
13:35:07 3 understanding of which fed agency has responsibility for
13:35:10 4 ensuring sugar related transactions comply with federal
13:35:15 5 antitrust laws?

13:35:16 6 A. Department of Justice.

13:35:18 7 Q. Have you ever previously worked with the Department
13:35:21 8 of Justice on a federal antitrust case, Dr. Fesco?

13:35:24 9 A. No.

13:35:24 10 Q. Dr. Fesco, did you undertake your own quantitative
13:35:27 11 analysis of the proposed transaction between US Sugar and
13:35:31 12 Imperial?

13:35:31 13 A. The only quantitative analysis I did was early on
13:35:34 14 when I just took data from sales delivery from beet and cane
13:35:41 15 processors and cane refiners going back as long as I had it.
13:35:47 16 So I had sales by company, by year and I grouped it by how I
13:35:51 17 perceived the marketing agents to cover those properties.

13:35:51 18 Q. Thank you.

13:35:51 19 And besides that analysis that you just
13:36:01 20 described, Dr. Fesco, did you do any other quantitative
13:36:04 21 analyses related to the proposed transaction?

13:36:07 22 A. On paper with statistic or regression analysis,
13:36:10 23 things like that, no.

13:36:11 24 Q. Okay. Dr. Fesco, is your testimony today about the
13:36:12 25 proposed transaction, does that reflect your personal

Fesco - cross

13:36:20 1 opinion or the opinion of the USDA?

13:36:22 2 A. That is my personal opinion based on educated and
13:36:27 3 informed observations.

13:36:29 4 Q. And Dr. Fesco, do you have any personal knowledge as
13:36:32 5 to whether the USDA has an official agency position on the
13:36:36 6 proposed transaction?

13:36:37 7 A. My understanding is the Department of Ag has a
13:36:41 8 position that it has no position.

13:36:44 9 Q. Thank you.

13:36:44 10 Dr. Fesco, a few minutes ago before lunch, you
13:36:49 11 mentioned in response to a question from defendant's counsel
13:36:52 12 that you thought the transaction might result in some
13:36:55 13 efficiencies or potentially lower prices, do you recall
13:36:58 14 that?

13:36:58 15 A. Yes.

13:36:59 16 Q. How did you come to form your belief that the
13:37:01 17 transaction could result in efficiencies?

13:37:04 18 A. It was based on the conversation I had with Matt
13:37:10 19 Wineinger and Mike Gorrell and Elaine Wood and Robert Buker
13:37:15 20 the day before they announced the transaction, they set up a
13:37:18 21 meeting with me and we thoroughly went over what the plan
13:37:22 22 was for this. And knowing these people as long as I have,
13:37:27 23 it sounded -- I had high faith that it was good.

13:37:31 24 Q. Did the individuals that you just mentioned,
13:37:34 25 Dr. Fesco, did they show you any data to support their

Fesco - cross

13:37:38 1 claims about the purported efficiency?

13:37:41 2 A. No.

13:37:42 3 Q. And so Dr. Fesco, is your belief about the potential
13:37:46 4 efficiencies based on your conversation with the parties or
13:37:49 5 did you perform any additional quantitative analysis?

13:37:53 6 A. Well, it's mostly based on the conversation, but I
13:37:59 7 have been around long enough and I understand the
13:38:04 8 interrelationships and in my mind I can do a quantitative
13:38:07 9 analysis, yes.

13:38:08 10 Q. But Dr. Fesco, did you do any quantitative analysis
13:38:11 11 on paper outside of your mind?

13:38:12 12 A. No.

13:38:13 13 Q. What is your level of confidence, Dr. Fesco, that the
13:38:16 14 transaction would result in efficiencies?

13:38:20 15 A. I'm pretty confident, yes.

13:38:23 16 Q. Dr. Fesco, do you recall that I took your deposition
13:38:25 17 earlier in this litigation?

13:38:27 18 A. Yes.

13:38:28 19 Q. Can I -- in the binder in front of you, there should
13:38:32 20 be, the last tab of the binder to your left there it do
13:38:40 21 United was the supplier should have your deposition
13:38:42 22 transcript in there, and if you could please turn to
13:38:44 23 page 238 of the last tab. Dr. Fesco, I want to direct your
13:39:00 24 attention to the line 21 on page 238?

13:39:10 25 A. Okay.

Fesco - cross

13:39:12 1 Q. And so Dr. Fesco at your deposition I asked you?

13:39:15 2 QUESTION: Question okay, so would it be fair,
13:39:18 3 Dr. Fesco to say that your view about the transaction and
13:39:21 4 the efficiency that would result from it is an educated
13:39:24 5 guess? And your answer was yes, do you recall that.

13:39:27 6 A. Yes.

13:39:28 7 Q. Okay. Dr. Fesco so, if US Sugar does acquire
13:39:33 8 Imperial, would the USDA be able to require United to offer
13:39:38 9 lower prices?

13:39:38 10 A. No, that's not in our jurisdiction.

13:39:41 11 Q. And Dr. Fesco, were you provided internal documents
13:39:44 12 and communications that were produced to the Department of
13:39:50 13 Justice in this litigation?

13:39:51 14 A. No.

13:39:53 15 Q. Defendant's counsel asked you before lots of
13:39:58 16 questions about how sugar flows in the United States, do you
13:40:01 17 recall that?

13:40:01 18 A. Yes.

13:40:02 19 Q. Are you familiar with something called the Jones Act,
13:40:05 20 Dr. Fesco?

13:40:05 21 A. Yes.

13:40:06 22 Q. What is the Jones Act?

13:40:07 23 A. My understanding it's like a workman's compensation
13:40:11 24 program for sailors, and it's funded by the requirement that
13:40:12 25 any vessels that transports cargo between U.S. ports must

Fesco - cross

13:40:21 1 have a U.S. crew, a U.S. flag, must be built in the U.S., et
13:40:26 2 cetera, and that adds costs to transportation.

13:40:29 3 Q. And what is your understanding, Dr. Fesco, of how the
13:40:33 4 Jones Act impacts the movement of sugar in the United
13:40:37 5 States?

13:40:37 6 A. It has been an impediment to the movement. Sugar.

13:40:41 7 Q. Do you have a specific example that describes how
13:40:45 8 that occurs?

13:40:46 9 A. In recent years there has been a glut of sugar in the
13:40:52 10 Louisiana and the Gulf area, and if the sugar could have
13:40:56 11 been used on the east coast, but the Jones Act has enough
13:41:02 12 cost to the transportation that it makes it cheaper for the
13:41:06 13 east coast to import sugar from the world or Mexico than
13:41:09 14 from the Gulf.

13:41:11 15 Q. Thank you.

13:41:12 16 I want to switch gears a little built,
13:41:15 17 Dr. Fesco. Who within the USDA sugar program makes the
13:41:19 18 ultimate decision about increasing the supply of sugar in
13:41:22 19 the United States?

13:41:24 20 A. I don't know. I just make recommendations and
13:41:27 21 somebody else above me makes the decision.

13:41:29 22 Q. And Dr. Fesco, while you have been at the USDA in
13:41:33 23 your experience, does the decision maker at the USDA share
13:41:37 24 with you the sources of information they consider when
13:41:40 25 making those decisions for the USDA sugar program?

Fesco - cross

13:41:44 1 A. Most likely not.

13:41:46 2 Q. Dr. Fesco, do you know who the ultimate decision
13:41:49 3 maker at the USDA sugar program will be in the future or is
13:41:54 4 that unknowable at this point in time?

13:41:56 5 A. It's unknowable at this time.

13:41:58 6 Q. Dr. Fesco, based on your long tenure at the USDA as
13:42:04 7 defendant's counsel described, will the USDA always make the
13:42:09 8 same decision with regards to the sugar program when face
13:42:12 9 had with similar market conditions and circumstances?

13:42:14 10 A. No, decisions are based on the administration at the
13:42:18 11 time.

13:42:18 12 Q. Thank you.

13:42:19 13 Dr. Fesco, what is your understanding of where
13:42:23 14 the USDA sugar program gets its mandate?

13:42:26 15 A. My understanding is that it's based off the 2008 Farm
13:42:31 16 Bill that established the sugar program.

13:42:31 17 Q. Thank you.

13:42:31 18 And what is your understanding of the sugar
13:42:35 19 program's mandate based on the 2008 Farm Bill?

13:42:39 20 A. Our mandate is to ensure there are adequate supplies
13:42:43 21 of raw and refined sugar and it supplies us with tools to
13:42:47 22 bring in imports if we need more sugar, but there is a
13:42:51 23 warning embedded in the language that says you can bring in
13:42:54 24 imports, but don't bring in so many that you cause
13:42:57 25 forfeitures.

Fesco - cross

13:42:59 1 Q. Dr. Fesco, do you understand the 2008 Farm Bill to
13:43:04 2 require the USDA to ensure reasonable prices of refined
13:43:08 3 sugar in the United States?

13:43:11 4 A. Could you repeat that?

13:43:12 5 Q. Sure.

13:43:13 6 Do you understand the 2008 Farm Bill to require
13:43:17 7 the USDA to ensure reasonable prices of refined sugar in the
13:43:22 8 United States?

13:43:23 9 A. The 2008 Farm Bill requires USDA to maintain adequate
13:43:28 10 supplies of raw and refined sugar, price is embedded,
13:43:32 11 implicit in that language.

13:43:34 12 Q. Is there any requirement with regards to prices that
13:43:37 13 the prices be reasonable with regards to the 2008 Farm Bill?

13:43:42 14 A. Reasonable prices is not mentioned in the language of
13:43:45 15 the 2008 Farm Bill.

13:43:49 16 Q. Defendant's counsel asked you a few questions about
13:43:53 17 the Harmonized tariff schedule and the provision in there
13:43:57 18 that gives the secretary of agriculture authority to ensure,
13:44:01 19 quote reasonable supplies, adequate supplies at reasonable
13:44:05 20 prices, do you recall that?

13:44:06 21 A. Yes.

13:44:09 22 Q. Dr. Fesco, does the USDA have an official definition
13:44:13 23 of what is quote reasonable as relates to that statutory
13:44:17 24 provision?

13:44:21 25 A. No. It's discretionary.

Fesco - cross

13:44:18 1 Q. Dr. Fesco, when the USDA takes action to increase
13:44:22 2 sugar imports into the United States, does the agency have
13:44:26 3 the ability to direct that sugar to specific ports of entry?

13:44:29 4 A. No.

13:44:30 5 Q. And when the USDA takes action to increase sugar
13:44:34 6 imports, does the agency know how this additional sugar will
13:44:39 7 impact prices in specific areas of the country?

13:44:42 8 A. We don't know with certainty, but we're inclined to
13:44:45 9 think that more imports would have a negative impact on
13:44:49 10 prices.

13:44:50 11 Q. Thank you.

13:44:50 12 Dr. Fesco, I now would like to ask open your
13:44:51 13 binder to PTX 300, please?

13:44:51 14 A. Okay.

13:45:00 15 Q. And Dr. Fesco, are you familiar with this document?

13:45:00 16 A. Yes.

13:45:11 17 MR. THORNBURGH: Your Honor, plaintiff moves to
13:45:13 18 admit plaintiffs Exhibit 300 into evidence.

13:45:14 19 MS. GIORDANO: No objection.

13:45:17 20 THE COURT: Thank you, it's admitted.

13:45:19 21 (PTX Exhibit No. 300 was admitted into
13:45:20 22 evidence.)

13:45:20 23 BY MR. THORNBURGH:

13:45:22 24 Q. Dr. Fesco, can you please explain to the Court what
13:45:25 25 this document is?

Fesco - cross

13:45:27 1 A. This is an announcement that USDA would reassign
13:45:32 2 surplus beet and cane sugar allotments among the processors
13:45:38 3 and then the surplus to imports, it was also an increase in
13:45:42 4 the TRQ and an extension of one of that year TRQ to enter.

13:45:48 5 Q. Dr. Fesco, when the USDA takes action like this to
13:45:52 6 increase the supply of sugar that the United States, is this
13:45:54 7 the typical form of a press release that would accompany
13:45:57 8 that decision?

13:45:58 9 A. Yes, it's a typical, we sometimes there is a federal
13:46:04 10 register notice along with a news release.

13:46:07 11 Q. I would like to direct your attention, Dr. Fesco to
13:46:10 12 page 3 of this press release, please. And there is an
13:46:17 13 excerpt up here on the screen in the courtroom and the
13:46:20 14 screen in front of you. And it says USDA is taking these
13:46:23 15 actions after determining that additional supplies of raw
13:46:27 16 cane sugar are required in the U.S. market." Do you see
13:46:30 17 that?

13:46:30 18 A. Yes.

13:46:31 19 Q. And Dr. Fesco, is that consistent or inconsistent
13:46:35 20 with your understanding of why USDA took these action in
13:46:40 21 September 2020 to increase the supply of domestic sugar?

13:46:42 22 A. That is consistent.

13:46:45 23 Q. Put that document aside, Dr. Fesco.

13:46:48 24 Dr. Fesco, again, when you were being questioned
13:46:52 25 by defendant's counsel you mentioned USDA monitors refined

Fesco - cross

13:46:59 1 spot prices, do you recall that?

13:47:01 2 A. Yes.

13:47:03 3 Q. To your knowledge, Dr. Fesco, are the spot prices
13:47:06 4 that the USDA monitors broken out by cane and beet
13:47:10 5 processors or are they aggregated together?

13:47:14 6 A. The refined spot prices are aggregated at regional
13:47:19 7 levels in the U.S.

13:47:20 8 Q. And Dr. Fesco so, what is your understanding of why
13:47:24 9 they were broken out by region of the country?

13:47:27 10 A. They're broken out by region because there is no one
13:47:30 11 national price for sugar in the country, the price is
13:47:34 12 dependent on location, population centers, transportation to
13:47:37 13 get it to the buyer, things like that.

13:47:41 14 Q. Dr. Fesco so, does the USDA monitor contract prices
13:47:44 15 between sugar producers and their customers?

13:47:48 16 A. No.

13:47:51 17 Q. Does the USDA have access to contractual prices
13:47:55 18 negotiated between a sugar producer and its customers?

13:47:58 19 A. We don't require it sometimes though somebody will
13:48:02 20 offer it, but we don't require that.

13:48:04 21 Q. Dr. Fesco, does the USDA dictate the prices offered
13:48:08 22 by a refined sugar producer or are those prices the result
13:48:12 23 of negotiations between sugar producers and their customers?

13:48:16 24 A. USDA does not dictate prices.

13:48:20 25 Q. Dr. Fesco, how if at all does the USDA dictate the

Fesco - cross

13:48:25 1 customer service that sugar producers offer their customers?

13:48:28 2 A. USDA has no involvement in customer relationships.

13:48:33 3 Q. A few minutes ago in response to my question, you
13:48:36 4 mentioned that sometimes you'll talk to sugar producers and
13:48:41 5 they'll give you some pricing information, do you recall
13:48:45 6 that? I'll rephrase, I don't want to put words in your
13:48:51 7 mouth. Dr. Fesco, do you sometimes have conversations with
13:48:54 8 sugar producers where pricing comes up?

13:48:58 9 A. That's less likely, I usually ask about prices and
13:49:02 10 things that might be disrupting, you know, disruptions in
13:49:06 11 the supply chain.

13:49:07 12 Q. And when prices do come up, Dr. Fesco, would you ever
13:49:11 13 take pricing information that one sugar processor has shared
13:49:16 14 with you and share it with another sugar processor?

13:49:19 15 A. No.

13:49:19 16 Q. Why not?

13:49:21 17 A. Because that would -- that is not our job. I stay
13:49:27 18 away from prices, discussions.

13:49:31 19 Q. Dr. Fesco, does the USDA have responsibility for
13:49:36 20 policing -- excuse me, let me try that again. Does the USDA
13:49:42 21 have responsibility for policing information sharing among
13:49:47 22 sugar industry participants for compliance with federal
13:49:50 23 antitrust laws?

13:49:50 24 A. No.

13:49:52 25 Q. Before lunch, Dr. Fesco, defendant's counsel asked

Fesco - cross

13:49:55 1 you a couple of questions about transparency. Do you recall
13:49:58 2 that?

13:49:58 3 A. Yes.

13:49:59 4 Q. And when you mentioned -- when you were referring to
13:50:03 5 transparency, were you referring to the USDA being
13:50:07 6 transparent with the industry?

13:50:11 7 A. Yes, I believe so.

13:50:18 8 Q. I would ask now that we display DTX 515 up on the
13:50:24 9 screen, specifically page 26. And Dr. Fesco, while that's
13:50:30 10 being put up on the screen, I would like to ask you about
13:50:31 11 historical sugar prices. Do you recall a time when
13:50:37 12 Imperial's Port Wentworth refinery was closed for an
13:50:41 13 extended period of time?

13:50:42 14 A. It closed February 8, 2008, after the explosion that
13:50:49 15 day.

13:50:49 16 Q. And so what, if anything, happened to domestic sugar
13:50:53 17 prices after this explosion?

13:50:55 18 A. As you can see, from that chart, prices skyrocketed.

13:51:02 19 Q. And Dr. Fesco, did the USDA take any actions to
13:51:06 20 increase the supply of sugar available in the United States
13:51:09 21 as prices were going up as shown here on the chart?

13:51:13 22 A. We took some actions, we didn't take any actions in
13:51:18 23 2009 and that escalated prices even further and we tried to
13:51:25 24 correct in 2010.

13:51:26 25 Q. During this period of time, it appears that the

Fesco - cross

13:51:29 1 prices remained elevated. Is that your recollection?

13:51:33 2 A. Yes, they were two, three times the support price.

13:51:40 3 Q. Eventually prices came back down as shown on this
13:51:45 4 chart; is that right?

13:51:46 5 A. Yes, when prices are high for a sustained period, it
13:51:50 6 gets attention, and there is a supply response and that's
13:51:54 7 exactly what we see, people planted more acres in Mexico and
13:51:59 8 the domestic.

13:52:00 9 Q. Dr. Fesco, you mentioned during this time when prices
13:52:03 10 were coming down, Mexico was importing large amounts of
13:52:07 11 sugar, is that right?

13:52:07 12 A. Yes.

13:52:08 13 Q. What Mexico was importing --

13:52:10 14 THE COURT: Mexico is importing or exporting
13:52:13 15 into the U.S.

13:52:15 16 MR. THORNBURGH: Importing Your Honor.

13:52:16 17 THE COURT: Mexico is importing into Mexico.

13:52:20 18 MR. THORNBURGH: United States is importing
13:52:21 19 sugar in from Mexico to the United States.

13:52:24 20 Q. During the time period during the Port Wentworth
13:52:28 21 explosion there were any restrictions on the volume of sugar
13:52:31 22 that could be imported in from Mexico?

13:52:33 23 A. No, it was operating under NAFTA which was fully
13:52:37 24 implemented on January 1st, 2008, so they had unrestricted
13:52:40 25 access to your market duty free.

Fesco - cross

13:52:44 1 Q. Is the same framework in place today for sugar being
13:52:48 2 imported from Mexico?

13:52:50 3 A. No, as a result of all the forfeitures that occurred
13:52:52 4 in 2013 there was the creation of the suspension agreement
13:52:57 5 that now managers trade between the U.S. and Mexico.

13:53:01 6 Q. How if at all does that impact the volume of sugar
13:53:04 7 that can be imported into the United States from Mexico?

13:53:07 8 A. It is restricted.

13:53:12 9 Q. Dr. Fesco, now I want to talk a little bit about
13:53:16 10 current sugar prices if we could. This chart here has
13:53:21 11 prices that go up into October 2021. So let me ask you
13:53:27 12 this. What is your understanding of the current refined
13:53:31 13 sugar prices in the United States?

13:53:32 14 A. They're on the high side.

13:53:34 15 Q. Are they in line with what's shown here on
13:53:39 16 October 2021?

13:53:41 17 A. Yes. They should be. Yes.

13:53:45 18 Q. And Dr. Fesco, it appears from the chart, but correct
13:53:49 19 me if I'm wrong, that prices have been elevated for some
13:53:53 20 period of time, is that right?

13:53:54 21 A. Yeah, they started creeping up last summer, 2020,
13:53:59 22 April.

13:53:59 23 Q. Has the USDA taken any actions, Dr. Fesco in the last
13:54:04 24 12 months to increase the supply of sugar in the United
13:54:07 25 States?

Fesco - cross

13:54:07 1 A. Yes, we have.

13:54:09 2 Q. More than one action?

13:54:11 3 A. Yes. We've reallocated TRQs, we have given Mexico
13:54:18 4 more, we have increased marketing allotments, things like
13:54:23 5 that.

13:54:24 6 Q. Dr. Fesco, what is the current forfeiture price range
13:54:29 7 for refined sugar under the USDA sugar program?

13:54:32 8 A. For refined sugar it's about \$0.25 a pound.

13:54:36 9 Q. So shown on the chart here, the current prices are
13:54:39 10 above that?

13:54:41 11 A. They're a good 10, 12, \$0.15 higher.

13:54:44 12 Q. When was the last time that you can recall that
13:54:47 13 domestic refined sugar prices were at forfeiture levels?

13:54:51 14 A. Well, there was a little period in 2016. But 2013
13:54:54 15 certainly had forfeiture levels.

13:55:01 16 Q. How often does that occur that prices come down to
13:55:04 17 forfeiture levels, Dr. Fesco?

13:55:07 18 A. Well, not often but since we had the suspension
13:55:10 19 agreement I don't forecast that ever happening as long as
13:55:13 20 the agreement is in place.

13:55:16 21 Q. Again, defendants counsel asked you a question about
13:55:19 22 Tier II sugar, do you recall that?

13:55:22 23 A. Yes.

13:55:25 24 Q. Just to be clear, Dr. Fesco, when you refer to the
13:55:28 25 price of Tier II sugar, is that a specific constant price?

Fesco - cross

13:55:32 1 A. No, it's based on the world price relative to the
13:55:35 2 domestic price.

13:55:37 3 Q. So what goes into determining the price of Tier II
13:55:41 4 sugar?

13:55:41 5 A. It's the number 11 world price plus some
13:55:46 6 transportation and miscellaneous costs, 4, \$0.05, plus
13:55:53 7 15-and-a-half, \$0.16, high-duty.

13:56:05 8 MR. THORNBURGH: Dr. Fesco, I have no further
13:56:07 9 questions for you. Thank you very much.

13:56:11 10 THE WITNESS: All right.

13:56:15 11 MS. GIORDANO: May I proceed, Your Honor?

13:56:15 12 REDIRECT EXAMINATION

13:56:19 13 BY MS. GIORDANO:

13:56:19 14 Q. Dr. Fesco, Mr. Thornburgh just asked you about
13:56:23 15 actions that USDA had taken in the last 12 months to
13:56:26 16 increase the supply, do you recall those questions?

13:56:28 17 A. Yes.

13:56:29 18 Q. Based on your lengthy experience managing the Federal
13:56:33 19 Sugar Program, if USDA had not taken all those actions in
13:56:36 20 the last 12 months, would prices of sugar be higher than
13:56:40 21 they are today?

13:56:40 22 A. Yes.

13:56:42 23 MS. GIORDANO: Thank you. No further questions.

13:56:42 24 THE COURT: I have a couple of questions. So I
13:56:45 25 think I understood you to say that in your view a regional

Fesco - cross

13:56:48 1 analysis, we have heard a lot about national versus
13:56:51 2 regional. But in your view a regional analysis doesn't make
13:56:55 3 complete sense because sugar flows and transport isn't
13:56:59 4 limited to regions, is that right?

13:57:02 5 THE WITNESS: Because sugar flows.

13:57:04 6 THE COURT: Sugar flows so what I think what you
13:57:07 7 were saying is that if the price gets high in one region,
13:57:10 8 sugar will flow in from another region to control that
13:57:14 9 price, is that right.

13:57:14 10 THE WITNESS: Yes, exactly.

13:57:15 11 THE COURT: I think you testified that Imperial
13:57:17 12 is a higher priced competitor, is that right.

13:57:20 13 THE WITNESS: Yes, they have no source of raw
13:57:22 14 sugar domestically.

13:57:24 15 THE COURT: So in your view one of the positives
13:57:26 16 from the merger could be that they would then have access to
13:57:30 17 US Sugar's raw sugar excess and that could reduce its cost,
13:57:32 18 right?

13:57:35 19 THE WITNESS: Yes, and also US Sugar would be
13:57:38 20 writing letters to USDA asking for more imports.

13:57:40 21 THE COURT: So you would have -- why is it
13:57:42 22 better to have US Sugar asking for more imports rather than
13:57:44 23 Imperial?

13:57:50 24 THE WITNESS: Imperial tends to stand-alone when
13:57:52 25 they're asking for increased access to the U.S. The other

Fesco - cross

13:57:59 1 cane refiners have their own domestic sources, so either --
13:58:05 2 it's usually the users and Imperial that are writing letters
13:58:08 3 to us to increase import access.

13:58:11 4 THE COURT: Now, do you have any understanding
13:58:14 5 of Imperial's market position over a period of time or not?

13:58:18 6 THE WITNESS: I -- as I mention I collect data
13:58:23 7 from beet and cane processors and cane refiners on a monthly
13:58:27 8 basis, and I have history going back to 1996 by month of
13:58:32 9 their stocks, their melt rates, their production, their
13:58:36 10 deliveries, their ending stocks. And I can look at this
13:58:41 11 year's forecast based in compare it to the past and get a
13:58:47 12 good feel for the position they're in.

13:58:51 13 THE COURT: Do you have any understanding as to
13:58:57 14 whether Imperial's position has been market position has
13:58:59 15 been decreasing, increasing or staying the same over the
13:58:59 16 last number of years?

13:59:01 17 THE WITNESS: I guess I can answer that. You
13:59:03 18 asked me, right? It's yes, it's been declining.

13:59:07 19 THE COURT: Substantially?

13:59:09 20 THE WITNESS: Well it depends on, you know, your
13:59:12 21 definition of substantial. I can see every year it's
13:59:17 22 declining more.

13:59:20 23 THE COURT: We have heard some testimony about
13:59:22 24 market concentration in the Herfindahl Hirschman index, do
13:59:25 25 you know what that is?

13:59:30 1 THE WITNESS: I don't personally. My cohort at
13:59:32 2 work has calculated it.

13:59:34 3 THE COURT: Happens -- do you know whether it's
13:59:37 4 been calculated for the sugar industry over any period of
13:59:41 5 time?

13:59:42 6 THE WITNESS: My cohort has calculated it.

13:59:44 7 THE COURT: But that's not something you know?

13:59:46 8 THE WITNESS: No.

13:59:46 9 THE COURT: And as I understood, is it your
13:59:50 10 understanding and I understand this isn't necessarily the
13:59:54 11 position of the USDA, but is it your understanding that if
13:59:58 12 anticompetitive behavior resulted from the proposed merger
14:00:02 13 that the USDA would be aware of it and have the ability to
14:00:06 14 address it?

14:00:07 15 THE WITNESS: We would be aware of it, but I
14:00:09 16 don't know what we can do to address it except use the tools
14:00:14 17 that we have. And I don't know if that would address
14:00:18 18 anticompetitive behavior.

14:00:19 19 THE COURT: And if the anticompetitive behavior
14:00:22 20 were to result in higher prices, would the USDA be able to
14:00:26 21 address that aspect?

14:00:28 22 THE WITNESS: Yes.

14:00:29 23 THE COURT: All right. Any other questions?

14:00:31 24 MS. GIORDANO: No, Your Honor.

14:00:32 25 MR. THORNBURGH: No Your Honor.

Hill - direct

14:00:36 1 THE COURT: All right. Thank you very much.

14:00:38 2 THE WITNESS: All right.

14:00:39 3 THE COURT: All right. What's next?

14:00:52 4 MR. BARBUR: Good afternoon, Your Honor. Peter
14:00:53 5 Barbur representing LDC and Imperial. And defendants call
14:01:00 6 Dr. Nicholas Hill.

14:01:11 7 COURT CLERK: Please raise your right hand.

14:01:15 8 Please state and spell your full name for the record.

14:01:32 9 THE WITNESS: Nicholas Hill. N-I-C-H-O-L-A-S,
14:01:34 10 H-I-L-L.

14:01:38 11 NICHOLAS HILL, having been duly sworn, was
14:01:42 12 examined and testified as follows:

14:01:47 13 MR. BARBUR: Your Honor, may I proceed?

14:02:03 14 THE COURT: Please.

14:02:03 15 DIRECT EXAMINATION

14:02:03 16 BY MR. BARBUR:

14:02:04 17 Q. Dr. Hill, how are you employed?

14:02:06 18 A. I'm a partner at the Bates White Consulting.

14:02:10 19 Q. What is your educational background?

14:02:12 20 A. I have a Ph.D. in economics from Johns Hopkins
14:02:16 21 University.

14:02:17 22 Q. And what is your field of expertise?

14:02:19 23 A. Economics.

14:02:21 24 Q. What did you do after you received your Ph.D.?

14:02:22 25 A. So I worked for seven years at the U.S. Department of

Hill - direct

14:02:30 1 Justice in their Antitrust Division, then I worked for two
14:02:34 2 years at the Federal Trade Commission which is the other
14:02:38 3 major U.S. antitrust agency, also as a staff economist. And
14:02:42 4 then I rejoined the DOJ as a supervising economist for three
14:02:47 5 years.

14:02:47 6 Q. Did you receive any awards while you were at the DOJ?

14:02:50 7 A. I did.

14:02:50 8 Q. Would you describe that?

14:02:51 9 A. I received an Attorney Generals Distinguished Service
14:02:55 10 award for my work on the Aetna/Humana merger.

14:02:57 11 Q. What sort of consulting work have you done since you
14:03:00 12 joined Bates White?

14:03:01 13 A. So I have largely worked on merger cases in a variety
14:03:05 14 of industries.

14:03:05 15 Q. Over the course of your government service and your
14:03:09 16 time at Bates White, approximately how many mergers have you
14:03:14 17 worked on?

14:03:14 18 A. It's more than a hundred.

14:03:17 19 Q. Have you been recognized by -- in court as an expert
14:03:21 20 on economic issues?

14:03:23 21 A. I have.

14:03:24 22 Q. Could you describe them?

14:03:25 23 A. Sure. So Your Honor, I have testified three times.
14:03:28 24 The first time was successfully on behalf of the FTC and its
14:03:32 25 attempt to block the merger of Tronox and Cristal. Then I

Hill - direct

14:03:36 1 testified successfully on behalf of the defense in the FTC
14:03:41 2 attempt to block the merger of Evonik-PeroxyChem and then I
14:03:43 3 testified on behalf of FTC successfully in its attempt to
14:03:48 4 block the merger, they changed their names, I think it was
14:03:52 5 Peabody Energy and Arch Resources.

14:03:54 6 Q. Have you been following the trial?

14:03:56 7 A. I have.

14:03:56 8 Q. Did you see Dr. Rothman's testimony?

14:03:59 9 A. I did.

14:04:01 10 MR. BARBUR: Your Honor, we offer Dr. Hill as an
14:04:03 11 expert in the field of economics.

14:04:06 12 THE COURT: Any objection?

14:04:09 13 MR. STRONG: No objection. Your Honor.

14:04:10 14 THE COURT: He's accepted.

14:04:10 15 BY MR. BARBUR:

14:04:12 16 Q. Dr. Hill, did you prepare demonstrative exhibits to
14:04:14 17 use with your testimony today?

14:04:16 18 A. I have.

14:04:17 19 Q. Can we display that, we marked it as DTX 008 for
14:04:20 20 identification. What was your assignment in this case?

14:04:21 21 A. My assignment was to evaluate the likely effect of
14:04:31 22 the transaction on competition and also to evaluate
14:04:32 23 Dr. Rothman's reports.

14:04:34 24 Q. Let's turn to the next slide. Does this provide an
14:04:42 25 overview of your testimony today?

Hill - direct

14:04:44 1 A. Yes, it does.

14:04:46 2 Q. So let's start with the approach to evaluating a
14:04:51 3 merger. What kind of evidence do you look at in assessing
14:04:54 4 whether a merger is likely to result in anticompetitive
14:04:58 5 effects?

14:04:59 6 A. So when evaluating the effect of the merger, I look
14:05:02 7 at the qualitative evidence the quantitative evidence and
14:05:06 8 I'll also do an economic analysis of the data.

14:05:09 9 Q. Is this simply a matter of applying technical or
14:05:12 10 mechanical tests?

14:05:13 11 A. No. Your Honor, each industry has a very different,
14:05:18 12 attempt at different competitive rhythms, so a lot of the
14:05:21 13 process is learning about how the industry works and
14:05:24 14 figuring out which data you can use to successfully analyze
14:05:28 15 competition.

14:05:29 16 Q. What tools do you use to assess whether a merger is
14:05:32 17 likely to result in anticompetitive effects?

14:05:34 18 A. So again, I evaluate usually the quantitative and
14:05:38 19 qualitative evidence and then I use some sort of economic
14:05:42 20 models to try to understand how competition works, but I
14:05:46 21 will usually also look at simpler quantitative evidence as
14:05:50 22 well, to try to get a picture.

14:05:52 23 Q. Are you familiar with the DOJ and FTC Horizontal
14:05:57 24 Merger Guidelines?

14:05:57 25 A. The 2010 guidelines?

Hill - direct

14:05:58 1 Q. Yes. And have you used those before?

14:06:00 2 A. I have.

14:06:01 3 Q. Did you use them in this case?

14:06:03 4 A. I have, yes.

14:06:03 5 Q. In your view what is the -- a proper role of the
14:06:09 6 horizontal merger guidelines?

14:06:10 7 A. The horizontal merger guidelines lay out a framework
14:06:13 8 for evaluating a merger and then the job of the person
14:06:16 9 evaluating the mergers is to take the evidence and fit into
14:06:20 10 that framework to analyze the likely effect of the
14:06:22 11 transaction.

14:06:24 12 Q. Can you apply the horizontal merger guidelines
14:06:27 13 mechanically?

14:06:28 14 A. As I said, each industry has its own rhythms, so
14:06:31 15 there is a process of fitting the analysis into the
14:06:34 16 guidelines, and the guidelines aren't specific about many
14:06:40 17 things, so it's more of a framework and then you're
14:06:43 18 performing the best analysis you can, given the limitations
14:06:45 19 of data and other things.

14:06:47 20 Q. And how do you think about the role of market
14:06:49 21 definition in assessing the possible effects of a merger?

14:06:52 22 A. The way I think about it is, Your Honor, the economy
14:06:54 23 has a lot of different products, so market definition is the
14:07:00 24 process of identifying the products of interest where
14:07:02 25 competition may be affected and also identifying where

Hill - direct

14:07:06 1 customers might turn to purchase those products.

14:07:08 2 Q. What are the dimensions of the market?

14:07:10 3 A. Yeah, so the first dimension is usually about the
14:07:14 4 product market definition so that's what are the products of
14:07:17 5 interest and then there is a geographic dimension, so where
14:07:20 6 do customers look to purchase the product.

14:07:22 7 Q. I think the Court has heard testimony about
14:07:24 8 unilateral effects. What are unilateral effects?

14:07:27 9 A. I think of unilateral effects of whether just
14:07:30 10 removing the head-to-head competition between the merging
14:07:33 11 firms would by itself, lead to a substantial lessening in
14:07:36 12 competition.

14:07:38 13 Q. What are coordinated effects?

14:07:40 14 A. I think of coordinated effects, if a transaction
14:07:43 15 makes it more likely that the firms will agree to compete
14:07:46 16 less aggressively as a result of the transaction, that would
14:07:49 17 be a coordinated effect.

14:07:50 18 Q. You mentioned models. In your view what role should
14:07:54 19 models play in assessing the effects of a merger?

14:07:56 20 A. So for kind of an important role, we use models to
14:08:00 21 try to estimate the effects of the transaction. Personally,
14:08:03 22 I tend to look holistically, again, at the quantitative
14:08:06 23 evidence, the qualitative evidence, modeling, and try to
14:08:10 24 bring it altogether and see what the actual picture.

14:08:13 25 Q. Do competitive effect models for mergers typically

Hill - direct

14:08:18 1 predict some price increases?

14:08:20 2 A. Yes, many competitive effects models don't build in
14:08:20 3 mitigating factors like entry or expansion or efficiencies,
14:08:26 4 so many will just as a default matter predict price
14:08:32 5 increase, so if you're not controlling for the mitigating
14:08:35 6 factors of the model it predicts mechanically a price
14:08:38 7 effect.

14:08:40 8 Q. With respect to this merger, what was your overall
14:08:43 9 conclusion?

14:08:44 10 A. I think the merger is unlikely to substantially
14:08:47 11 reduce competition.

14:08:50 12 Q. Is your overall conclusion regarding the effects of
14:08:53 13 the merger supported by other market participants?

14:08:56 14 A. Yes, it is. There has been testimony from, among
14:08:59 15 others, Dr. Fecso who was just here, Michigan Sugars,
14:09:02 16 representative of Michigan Sugar, representative of Domino,
14:09:05 17 possibly ASR, they have also testified that they don't think
14:09:12 18 the transaction is likely to reduce competition.

14:09:15 19 Q. What is your evaluation of Dr. Rothman's analysis of
14:09:18 20 the merger?

14:09:19 21 A. I think his analysis is flawed.

14:09:21 22 Q. And notwithstanding those flaws, how do Dr. Rothman's
14:09:24 23 ultimate conclusions compare to yours?

14:09:26 24 A. Yes. So we disagree on what we think is the proper
14:09:32 25 modeling effects, but I think both of our modeling when put

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14:09:36 1 into proper context predicts no significant price effects.

14:09:39 2 Q. How does Dr. Rothman define the relevant market, the
14:09:43 3 relevant product market, we'll start there?

14:09:45 4 A. Dr. Rothman defines the relevant product market as
14:09:49 5 the production and sale of refined sugar.

14:09:51 6 Q. Do you agree with that definition?

14:09:53 7 A. I do not.

14:09:53 8 Q. Why not?

14:09:54 9 A. Market definition is about demand, what are customers
14:09:59 10 looking for. And what I have seen of the evidence,
14:10:02 11 customers are not overly concerned about whether the sugar
14:10:05 12 they're purchasing has been produced by the entity itself,
14:10:09 13 they're purchasing from a number of different potential
14:10:13 14 suppliers.

14:10:13 15 Q. How does Dr. Rothman treat US Sugar?

14:10:15 16 A. Dr. Rothman treats US Sugar as a -- and United Sugar
14:10:20 17 and all the other incentives of United Sugar as a single
14:10:23 18 entity with perfectly aligned members.

14:10:24 19 Q. Do you agree with that?

14:10:26 20 A. I do not.

14:10:28 21 Q. And does Dr. Rothman present any analysis to support
14:10:32 22 his conclusion with respect to the role of United?

14:10:34 23 A. He does not.

14:10:36 24 Q. Does Dr. Rothman include distributors in his market?

14:10:40 25 A. No, he excludes distributors.

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14:10:46 1 Q. And you agree with that?

14:10:47 2 A. I do not.

14:10:49 3 Q. Let's turn to geographic market. What steps do you
14:10:52 4 take to define a geographic market?

14:10:54 5 A. So, Your Honor, here I usually take two distinctive
14:10:59 6 steps. The first step is try to identify what I will call a
14:11:03 7 candidate market, what are the products and geographic area
14:11:06 8 in which customers are looking to buy the product. And then
14:11:08 9 I'll try to test that market using the available evidence to
14:11:12 10 see if it makes sense as a relevant market.

14:11:15 11 Q. And what factors do you consider when evaluating
14:11:19 12 whether a candidate market is a proper geographic market?

14:11:22 13 A. So typically I'll look at a range of things. So I'll
14:11:26 14 look at whether the -- if you're defining the geographic
14:11:30 15 market look at is there differential pricing in this market,
14:11:33 16 is there past evidence that prices have differed in this
14:11:36 17 region or area compared to the rest of the country. I'll
14:11:39 18 look to see if there has been any natural experiments where
14:11:43 19 supply has changed in one area and see how that affected
14:11:46 20 prices in the region of interest. And, you know, then I'll
14:11:50 21 typically also perform a hypothetical monopolist test.

14:11:53 22 Q. Do you look at real world evidence and industry
14:11:56 23 issues?

14:11:59 24 A. Yeah. If you -- so in some industries you will see
14:12:02 25 recognition inside the industry that a particular geographic

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14:12:07 1 area is thought of as a distinct area that has its own
14:12:11 2 dynamics compared to other areas.

14:12:13 3 Q. Overall, what is your conclusion with respect to how
14:12:16 4 Dr. Rothman defines his geographic market?

14:12:18 5 A. I think his geographic markets are overly broad,
14:12:21 6 narrow, sorry.

14:12:23 7 Q. Thank you.

14:12:24 8 And did Dr. Rothman begin with an analysis of
14:12:27 9 real world evidence to identify candidate markets?

14:12:30 10 A. No, I believe he testified that he took the
14:12:33 11 geographic markets that were proposed by the United States.

14:12:36 12 Q. And do you agree with the way that Dr. Rothman
14:12:39 13 applied his hypothetical monopolist test?

14:12:41 14 A. I do not. I think his hypothetical monopolist test
14:12:43 15 is flawed.

14:12:44 16 Q. We'll come back to that later.

14:12:47 17 Did you identify any alternative markets that
14:12:50 18 you believe are more appropriate than Dr. Rothman's markets?

14:12:53 19 A. I did.

14:12:54 20 Q. What were those?

14:12:57 21 A. So I identified two markets, Your Honor. One is what
14:12:59 22 I call the competitive overlap market which is the area in
14:13:02 23 which today United and Imperial compete. And then I looked
14:13:04 24 at the entire United States.

14:13:06 25 Q. And do you find any concentration concerns in your

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14:13:13 1 proposed markets?

14:13:14 2 A. No.

14:13:16 3 Q. You talked about a national market. In order to
14:13:20 4 define a market consisting of the entire United States, do
14:13:26 5 you need to assume, for example, that a supplier in
14:13:30 6 California is as competitive in Florida as a Florida
14:13:34 7 supplier would be?

14:13:35 8 A. No. And so a simple example I would give to that,
14:13:39 9 Your Honor, if you imagine there is a product and there is
14:13:41 10 three producers of it. There is one in California, there is
14:13:44 11 one in Delaware, and there is one in the center of the
14:13:47 12 country. The two producers on the coast may not directly
14:13:51 13 compete with each other frequently, but the producer in the
14:13:54 14 center, if they see a price change on the either coast can
14:13:59 15 redirect production in that direction, so prices may be
14:14:02 16 equalized nationally, even though there is not direct
14:14:05 17 head-to-head competition between the firms on the coast.

14:14:08 18 Q. Turning to unilateral effects, do you agree with
14:14:12 19 Dr. Rothman's opinion concerning unilateral effects?

14:14:15 20 A. I do not.

14:14:18 21 Q. Did you identify any factors that Dr. Rothman left
14:14:22 22 out of his analysis of unilateral effects?

14:14:23 23 A. I did.

14:14:24 24 Q. What were those?

14:14:25 25 A. So I think Dr. Rothman in his analysis didn't take

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14:14:27 1 account properly of entry and expansion, the possibility
14:14:31 2 that firms rivals would respond to higher prices to try to
14:14:35 3 increase their supply. I believe he didn't take account of
14:14:38 4 efficiencies properly, the possibility that the merged firm
14:14:42 5 will compete more aggressively post merger. He didn't take
14:14:46 6 into account the role of the USDA. He didn't include
14:14:50 7 distributors in his analysis. And he also assumed, Your
14:14:53 8 Honor, that United and U.S. Sugar are a single unified
14:14:57 9 entity.

14:14:58 10 Q. What models did Dr. Rothman use?

14:15:00 11 A. Dr. Rothman used two models.

14:15:02 12 Q. And what conclusions did you reach about
14:15:06 13 Dr. Rothman's models?

14:15:07 14 A. I think that his models are flawed, but as I said
14:15:10 15 earlier, I believe if you look past the flaws they still
14:15:14 16 predict small price increases.

14:15:18 17 Q. Did you construct any models of your own?

14:15:21 18 A. I did.

14:15:21 19 Q. What are they?

14:15:22 20 A. I constructed two models, one a bidding model and the
14:15:26 21 other was a relative cost model.

14:15:28 22 Q. Overall, how are the result of your models compared
14:15:32 23 to the results from Dr. Rothman's models?

14:15:33 24 A. My models predict very minimal price increases, but
14:15:36 25 compared to Dr. Rothman's, his models also predict very

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14:15:43 1 small price increases. Even though we differed
14:15:46 2 significantly on how best to model it, I think we ended up
14:15:50 3 in relatively the same place.

14:15:51 4 Q. Do you agree with Dr. Rothman's conclusions with
14:15:54 5 respect to coordinated effects?

14:15:56 6 A. I do not.

14:15:56 7 Q. Did you examine whether factors about the sugar
14:15:59 8 industry made coordination likely or unlikely?

14:16:02 9 A. I did.

14:16:02 10 Q. And what did you conclude?

14:16:04 11 A. So, I think the sugar industry has a number of -- or
14:16:09 12 sorry, the sugar industry has a number of characteristics
14:16:11 13 that make coordinated behavior unlikely. First, there are
14:16:16 14 large sophisticated buyers.

14:16:18 15 Second, the large sugar buyers, producers,
14:16:19 16 allocate supply using procurement auctions which tends to
14:16:23 17 sharpen competition. And there are a number of maverick
14:16:26 18 firms in the industry, firms that are looking to expand.
14:16:30 19 And here unlike in some industries there is no past history
14:16:32 20 of coordination.

14:16:32 21 Q. Dr. Rothman points to a number of e-mails that he
14:16:40 22 says supports his conclusion with respect to coordinated
14:16:42 23 effects. Did you review those e-mails?

14:16:42 24 A. I did.

14:16:42 25 Q. And do you agree with Dr. Rothman's assessment of

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14:16:51 1 those e-mails?

14:16:52 2 A. I do not.

14:16:53 3 Q. Do those e-mails suggest any actual coordination or
14:16:58 4 agreement?

14:16:58 5 A. They do not.

14:17:00 6 Q. Do the e-mails suggest any mechanism for reaching any
14:17:04 7 tacit or explicit agreement to raise prices?

14:17:08 8 A. They do not.

14:17:09 9 Q. Before we walk through your opinions in more detail,
14:17:14 10 can you describe for the Court some of the key facts you
14:17:17 11 think need to be considered in order to assess competitive
14:17:20 12 effects in the sugar industry?

14:17:21 13 A. Yes. I think it's a couple of facts that I don't
14:17:24 14 think will surprise Your Honor. I think sugar travels long
14:17:28 15 distances. I think that Imperial is a high cost firm. I
14:17:32 16 think that there are a number of maverick firms in this
14:17:36 17 industry looking to expand. And I think that there are low
14:17:39 18 barriers to entry and expansion.

14:17:42 19 Q. Just so we are clear, what is a maverick firm?

14:17:42 20 A. So, a maverick firm is a firm that has an incentive
14:17:50 21 to compete aggressively, even if that may lower the price in
14:17:53 22 the marketplace.

14:17:54 23 Q. Why do you say Imperial is not a maverick?

14:17:57 24 A. So, firms that have a very high cost are not in a
14:17:59 25 position to be a maverick. It's very difficult for them to

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14:18:02 1 compete very aggressively. In some ways these high cost
14:18:05 2 firms are anti-mavericks, a firm that goes along to get
14:18:10 3 along.

14:18:10 4 Q. I would like to turn to some more detail about your
14:18:14 5 opinions beginning with product market definition. You
14:18:18 6 mentioned that Dr. Rothman wrongly treats United as the
14:18:22 7 relevant entity. Can you explain that further?

14:18:27 8 A. Sure. So in Dr. Rothman's analysis he treats US
14:18:32 9 Sugar as the purchaser, is attempting to purchase Imperial,
14:18:36 10 but in his analysis he treats United as the decision maker
14:18:40 11 and he argues that the members of United have such aligned
14:18:43 12 incentives that it is as though United is the one purchasing
14:18:46 13 Imperial.

14:18:49 14 And the purpose of this chart, Your Honor, and
14:18:52 15 I'll walk through it, is to try to show that the members of
14:18:55 16 United do not necessarily have aligned incentives. There
14:18:58 17 may be times when they do, and there may be times when they
14:19:01 18 don't. So the figure here is broken up into two blocks. On
14:19:04 19 the left, we have an initial setting. And here we have --
14:19:07 20 this is just a rough example, we see the one dollar per
14:19:10 21 hundredweight market price is illustrative.

14:19:13 22 But, in this initial period here, US Sugar,
14:19:16 23 American Crystal, Minn Dak and Wyoming, four members of
14:19:19 24 United are all producing 100 hundredweights. And United
14:19:22 25 shares revenue on a pro rata basis, each of them because

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they put in 25 percent of the production, gets 25 percent of the revenues. You can see the price is \$1. Each of them is producing 100, so it's sold for \$100, each of them is getting \$100 in revenue.

In the block that's marked final this is when US Sugar has decided unilaterally to increase its output. And here it's gone from producing 100 to producing 200. You heard testimony from Dr. Fecso that when you see an increase in quantity, the market price is going to go down. Here we have the market price falling from \$1 to \$0.75 per hundredweight. Now this increase by US Sugar increases its share of the pool, and its member revenue increases from 100 to 150. So, US Sugar in this example is increasing its revenue through its unilateral decision to expand output. But, American Crystal, Minn Dak and Wyoming, the other members don't see any increase in output and they see the market price fall. So their revenue decreases. So, the example here is showing that there are situations, such as this one, where US Sugar may have an incentive to expand, but that may not be in the best interest of the other members of United.

Q. So do the four members of United have aligned incentives with respect to pricing?

A. No, not necessarily. Each one is making -- so Your Honor, the structure of United is that the individual

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members make their own decisions about production and then United sells the sugar that they produce. And so the decisions that each individually makes may or may not be beneficial to the other members.

Q. Did you analyze any real world evidence concerning this?

A. Yes. If you could please advance one more slide.

So this, Your Honor, is this chart with a similar structure here, but we're using crop year 2019 on the left and crop year 2020 on the right. And as you heard testimony that in the crop year 2020 there was a beet freeze which severely damaged the harvest of beets in upper midwest. Indeed if you look at the chart and you compare reduction, the quantity columns for American Crystal in 2019 and 2020, you'll see it fell from roughly 36 million hundredweight to about 23 million hundredweight. And Minn Dak and Wyoming also see falls in their production. US Sugar on the other hand, which was not affected by the beet freeze, saw a modest increase in its quantity produced. The effect of the beet freeze where there was an involuntary reduction of output, by the beet members of United meant that their share of the pool fell significantly. The share of the pool for US Sugar increased significantly and member revenues rose for US Sugar and fell for the other members of United. This is just an example where a change in output in

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14:22:40 1 this case involuntary, can have different impacts on the
14:22:44 2 different members of United. It's just showing that their
14:22:47 3 members do not necessarily have perfectly aligned
14:22:50 4 incentives.

14:22:51 5 Q. How does Dr. Rothman's treatment of United affect his
14:22:55 6 calculation of concentration and market share?

14:22:58 7 A. So I think it overstates it because he's assuming
14:23:01 8 that United is a single United decision maker, but in fact
14:23:05 9 the members of US Sugar -- sorry, the members of United may
14:23:09 10 have different incentives.

14:23:13 11 Q. Are you saying that United is not at all relevant in
14:23:17 12 this case?

14:23:21 13 A. No. So, United's role is to sell all the sugar
14:23:25 14 produced by the members. And I think one way you can think
14:23:29 15 about it is the most conservative assumption would be to say
14:23:33 16 that each member of United is an independent entity making
14:23:37 17 its own decisions on everything, including pricing, and the
14:23:41 18 most aggressive would be to say, all the members of United
14:23:45 19 Sugar are perfectly aligned with each other in the same
14:23:49 20 instance. Dr. Rothman takes that most aggressive position
14:23:53 21 in his analysis, I think somewhere in between is more
14:23:57 22 realistic.

14:23:58 23 Q. Let's turn to distributors. How does Dr. Rothman
14:24:02 24 treat distributors in his market?

14:24:06 25 A. Dr. Rothman treats them as customers.

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14:23:57 1 Q. Do you agree with that treatment?

14:24:01 2 A. I do not.

14:24:02 3 Q. Why not?

14:24:03 4 A. Distributors make sales to customers. And we have
14:24:08 5 heard testimony of them competing with other suppliers to
14:24:12 6 win customers and if you -- for example, if you look in the
14:24:15 7 upper right-hand corner here, Your Honor, that's the Indiana
14:24:19 8 Sugar logo. They sold on the order of about [REDACTED]
14:24:24 9 [REDACTED] in Dr. Rothman's southeast region where the
14:24:28 10 total sales are 50 million, so they were about [REDACTED]
14:24:31 11 of all sales. They compete, they sell to customers.

14:24:34 12 Q. Dr. Rothman says that distributors should be excluded
14:24:37 13 from the market because they are dependent on refiners. Do
14:24:41 14 you agree with that?

14:24:42 15 A. I do not.

14:24:43 16 Q. Let's turn to the next slide. What does this show?

14:24:48 17 A. So this chart, Your Honor, is looking at production
14:24:51 18 by distributors -- sorry, the sources of supply for
14:24:55 19 distributors for 2020 and 2021. And we just presented both
14:25:00 20 years, just to show that it looks very similar across the
14:25:04 21 years. And what it is showing if you look at the 2021 bar
14:25:08 22 is the gray area it's imports. And then that green area is
14:25:12 23 United. The red area is Imperial. The blue area is Domino.
14:25:16 24 And what is showing is the distributors buy from a variety
14:25:20 25 of sources. And this gives them independence and the

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14:25:28 1 ability to compete with other suppliers.

14:25:30 2 Q. And how does Dr. Rothman's treatment of the
14:25:33 3 distributors affect his market share and market
14:25:36 4 concentration calculation?

14:25:37 5 A. Again, it will tend to over share -- over -- it will
14:25:41 6 tend to overstate his market shares for the parties and it
14:25:44 7 will tend to overstate his concentration, because he's
14:25:48 8 assuming that the distributors are not independent.

14:25:50 9 Q. Are you saying that the distributors compete to serve
14:25:55 10 every customer and sale?

14:25:55 11 A. No. So again, distributors compete to serve some
14:25:58 12 customers, they may not compete to serve others. But
14:26:02 13 completely eliminating them from every market is aggressive.
14:26:05 14 It's similar to the position that US Sugar -- the members of
14:26:10 15 United are all perfectly aligned in their incentives.

14:26:14 16 Q. Have you reached a conclusion about the proper
14:26:17 17 relevant product market in this case?

14:26:19 18 A. I have.

14:26:19 19 Q. What is your conclusion?

14:26:22 20 A. I think the proper product market here is the sale of
14:26:25 21 refined sugar to wholesale customers.

14:26:28 22 Q. If the Court were to conclude that Dr. Rothman's
14:26:32 23 product market definition is correct, how would that affect
14:26:35 24 your analysis?

14:26:37 25 A. It wouldn't affect it. To be conservative, I

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14:26:40 1 followed Dr. Rothman in my treatment of both distributors
14:26:43 2 and in my treatment of US Sugar and United, and even with
14:26:48 3 those aggressive assumptions, my analysis shows there is
14:26:52 4 unlikely to be substantial reduction in competition.

14:26:55 5 Q. Let's turn to geographic market. In your view what
14:26:59 6 is the proper methodology for defining a geographic market?

14:27:02 7 A. So I think the first step for defining geographic
14:27:06 8 market is to take a holistic look across an array of
14:27:12 9 evidence of where the customers turn to for supply.

14:27:16 10 Q. What is a price discrimination market?

14:27:18 11 A. So, Your Honor, there are two types of markets that
14:27:21 12 are often defined, the first is defined around the location
14:27:23 13 of producers. The second is defining the location around
14:27:26 14 the location of customers. And that's also referred to as
14:27:30 15 price discrimination market. So the idea is that prices may
14:27:32 16 differentially change for a group of customers in a
14:27:35 17 particular geographic market.

14:27:41 18 Q. When is it appropriate to define a price
14:27:43 19 discrimination market?

14:27:45 20 A. So, usually you want to be sure you can raise the
14:27:48 21 price differentially for this geographic area and not raise
14:27:52 22 it in other areas. That typically requires at least two
14:27:54 23 things to be true. So one is you have to be able to
14:27:57 24 identify the location for the customer. If you don't know
14:28:00 25 where they are coming from it is hard to price discriminate

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14:28:04 1 against them. And then second, you want to be sure that
14:28:07 2 there won't be arbitrage or opportunistic buying particular
14:28:11 3 to the buyer. So, if I raise prices in one part of the
14:28:14 4 country, the customers can buy outside of that region and
14:28:16 5 move it into the region to defeat the higher prices, it's
14:28:20 6 not going to be possible to price discriminate against them.

14:28:27 7 Q. What is the impact of having too narrow of a market?

14:28:32 8 A. If you have too narrow of a market, your market
14:28:35 9 shares and concentrations will not be reliable.

14:28:38 10 Q. And did you analyze Dr. Rothman's geographic market
14:28:41 11 definitions in this case?

14:28:43 12 A. I did.

14:28:46 13 Q. And what did you conclude?

14:28:49 14 A. So I think they're flawed. I would start with, I
14:28:52 15 think the markets he defined are arbitrary, so rather than
14:28:55 16 starting with a holistic view and identifying the reasonable
14:28:58 17 geographic area, he accepted the markets that were proposed
14:29:01 18 by the United States. I think he didn't test those markets
14:29:04 19 properly. I think as I mentioned earlier, if you're
14:29:07 20 alleging the prices are going to rise differentially in a
14:29:10 21 particular area, typically you want to show some specific
14:29:13 22 evidence such as prices have risen in that area before
14:29:16 23 without rising elsewhere. And one way you can do that is
14:29:19 24 some sort of natural experiment, if there is change in
14:29:22 25 supply, did I see prices that that region rise but not rise

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14:29:29 1 elsewhere. And then finally, you perform a hypothetical
14:29:33 2 monopolist test, to test whether it's likely that this is a
14:29:35 3 properly defined market.

14:29:37 4 Q. Do you think that Dr. Rothman properly applied the
14:29:41 5 hypothetical monopolist test?

14:29:41 6 A. I do not.

14:29:43 7 Q. What geographic markets does Dr. Rothman identify?

14:29:49 8 A. I think if we advance one more slide you'll see a
14:29:53 9 picture of his markets. I believe you have seen these
14:29:55 10 before, Your Honor, but the dark green here is
14:29:59 11 Dr. Rothman's, what I would call the Georgia plus market,
14:30:01 12 Georgia and states that border it, and then anything in
14:30:05 13 green, whether it's light green or dark green is what
14:30:09 14 Dr. Rothman calls the southeast or the United States calls
14:30:13 15 the southeast market.

14:30:15 16 Q. Does Dr. Rothman define these as price discrimination
14:30:19 17 markets?

14:30:21 18 A. He does.

14:30:23 19 Q. And do Dr. Rothman's markets meet the requirements of
14:30:27 20 a price discrimination market?

14:30:29 21 A. I don't believe that they do, no. I believe that the
14:30:33 22 -- he has not properly accounted for the likelihood of
14:30:37 23 arbitrage by customers inside these regions.

14:30:41 24 Q. You said that Dr. Rothman's geographic markets are
14:30:45 25 arbitrary. Can you provide an example of how that is so?

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14:30:49 1 A. Sure. If we advance one more slide.

14:30:53 2 So, Your Honor, this is a breakdown of
14:30:56 3 Imperial's 2021 sales by state. And so let me give you a
14:31:00 4 guide first to the color coding. If you see a state in dark
14:31:04 5 blue, that means it's in Dr. Rothman's Georgia plus market.
14:31:07 6 If you see it in dark blue or light blue, it's in the
14:31:11 7 southeast market. And if you see it in red, it's in neither
14:31:15 8 of those markets. And so what -- and I have sorted the
14:31:19 9 states here from left to right from largest to smallest, by
14:31:21 10 Imperial's sales in 2021. And this picture, Your Honor,
14:31:24 11 will look the same if you use other recent years. It won't
14:31:31 12 be identical but essentially the same. You can see Texas
14:31:34 13 which is the third largest state for Imperial has been
14:31:37 14 excluded. Indiana has been excluded. Pennsylvania has been
14:31:43 15 excluded. But much smaller states like Alabama have been
14:31:48 16 included. So, the selection of which of these states is in
14:31:51 17 and out of the market seems arbitrary.

14:31:53 18 Q. Overall, what portion of Imperial's sales does
14:31:56 19 Dr. Rothman exclude?

14:31:58 20 A. So for the Georgia plus market about 47 percent of
14:32:04 21 sales for Imperial in 2021 were outside the Georgia plus
14:32:08 22 market. For the southeast the number is closer to about
14:32:12 23 33 percent.

14:32:13 24 Q. And let's go to the next slide. You also prepared a
14:32:17 25 slide on the Mid-Atlantic region. Do you want to describe

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14:32:20 1 this?

14:32:21 2 A. Sure. Here, Your Honor, we're zooming in on some
14:32:25 3 states in the Mid-Atlantic. You can see here green means
14:32:28 4 that the state was included in Dr. Rothman's market and red
14:32:31 5 means that it was excluded. And you can see that Virginia
14:32:35 6 was included, and then Pennsylvania and New Jersey were both
14:32:39 7 excluded. And then Maryland which is significantly smaller
14:32:43 8 than either was included. So again the selection of states
14:32:47 9 here seems arbitrary.

14:32:48 10 Q. Why is the exclusion of Pennsylvania significant?

14:32:51 11 A. So if you advance one more slide, please. So here,
14:32:54 12 Your Honor, on the left you have -- we've tried to show
14:32:57 13 market shares at the state level, we call them state shares.
14:33:00 14 On the left we have Maryland and on the right we have
14:33:03 15 Pennsylvania. Again, the parties here, United is -- United
14:33:06 16 here is in green and Imperial is in red.

14:33:10 17 You can see that in Pennsylvania, which remember
14:33:13 18 was a state in which there are significantly more sales for
14:33:16 19 Imperial than in Maryland. United and Imperial also have
14:33:19 20 significantly more market share. And yet this state,
14:33:22 21 Pennsylvania, was excluded. And Maryland where United and
14:33:25 22 Imperial have a smaller share and Imperial makes
14:33:28 23 significantly less sales was excluded -- was included,
14:33:31 24 sorry.

14:33:34 25 Q. Let's turn to the southwest, what portion of

Hill - direct

14:33:42 1 Imperial's sales in the southwest does Dr. Rothman exclude?

14:33:46 2 A. He excludes the vast majority. So this slide has
14:33:50 3 similar structure to the two slides. If it's in red that
14:33:54 4 means the state was excluded and if it's in green, Your
14:33:57 5 Honor, it means it was included. And we can see on the far
14:34:00 6 right, Mississippi is in green despite Imperial having
14:34:05 7 negligible sales there and on the left section Texas which
14:34:10 8 is the third largest state has been excluded.

14:34:14 9 THE COURT: Tell me, where do these names come
14:34:17 10 from? Do you define the southwest or did somebody else?

14:34:21 11 THE WITNESS: This is from a document that
14:34:23 12 Dr. Rothman cited in his initial report.

14:34:25 13 THE COURT: That one with the country with all
14:34:26 14 the different colors on it?

14:34:28 15 THE WITNESS: It's a different one, but it's
14:34:30 16 very close to that in his report. It's a document that
14:34:32 17 breaks Imperial in sales regions. My understanding is
14:34:34 18 Imperial itself doesn't use these sales regions, but the
14:34:36 19 southwest was one of the defined regions in the document
14:34:40 20 Dr. Rothman cited.

14:34:42 21 THE COURT: I don't think of Mississippi being
14:34:44 22 in the southwest.

14:34:46 23 THE WITNESS: No, I agree with you.

14:34:50 24 MR. BARBUR:

14:34:52 25 Q. Let's go to the next slide. What does this show,

Hill - direct

14:34:52 1 Dr. Hill?

14:34:53 2 A. Sure. So this is another slide from Dr. Rothman's
14:34:56 3 report which he presented as evidence supporting his market
14:35:00 4 definition. This is by McKeany-Flavell. You can see their
14:35:05 5 logo on the lower right-hand side there. This is what they
14:35:08 6 report to be Imperial primary marketing region in pink and
14:35:12 7 red and secondary marketing region in blue. Here,
14:35:15 8 Dr. Rothman's markets exclude some of the states that are in
14:35:20 9 these regions and include areas that are not in these
14:35:24 10 regions.

14:35:27 11 Q. You also mentioned arbitrage. What is arbitrage?

14:35:31 12 A. So arbitrage is opportunistic buying, taking
14:35:34 13 advantage in the context of a geographic markets, purchasing
14:35:37 14 in an area where prices are low and moving it to an area
14:35:41 15 where prices are higher.

14:35:45 16 Q. Why does arbitrage matter in a price discrimination
14:35:49 17 market?

14:35:49 18 A. So when you're defining a price discrimination
14:35:53 19 market, Your Honor, you want to believe that the prices can
14:35:56 20 rise in that area for customers. One way that might be
14:35:59 21 defeated is if customers would purchase at a low price
14:36:03 22 outside the market and arrange transportation for themselves
14:36:06 23 into the market.

14:36:09 24 Q. How does Dr. Rothman account for arbitrage in his
14:36:13 25 analysis?

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14:36:11 1 A. He does not fully account for arbitrage in his
14:36:15 2 analysis.

14:36:15 3 Q. Have you seen evidence that sugar flows and that
14:36:19 4 arbitrage is possible?

14:36:20 5 A. There is extensive evidence that sugar is able to
14:36:25 6 travel long distances. I would give a couple of examples of
14:36:28 7 that, which you may already be familiar, Your Honor. One, I
14:36:32 8 think the Court has heard Savannah, Georgia sells
14:36:35 9 significant volumes in Texas which is on the order of a
14:36:38 10 thousand miles away.

14:36:41 1 Similarly, from the perspective of United,
14:36:42 2 United make sales in what I call Dr. Rothman's southeast
14:36:44 3 region from the Red River Valley which is also a significant
14:36:51 4 distance away. Finally, as Dr. Fecso testified, there are
14:36:55 5 significant imports into the United States every year from
14:36:58 6 countries outside of the United States. Sugar can move
14:37:01 7 internally and sugar can also come in externally.

14:37:04 8 Q. Let's turn to the next slide. This is a United Sugar
14:37:09 9 document that I think has been displayed before. What is it
14:37:12 10 showing?

14:37:12 11 A. This is on the same theme, Your Honor. This is
14:37:15 12 United documents, and it's showing the flows of industrial
14:37:18 13 bulk sugar around the United States. And you can see the
14:37:21 14 arrows are moving in all directions and it's showing sugar
14:37:24 15 moving significant distances.

Hill - direct

14:37:29 1 Q. And is sugar flowing both into and out of
14:37:34 2 Dr. Rothman's proposed markets?

14:37:36 3 A. That's correct. There is an arrow flowing in from
14:37:39 4 Louisiana where there is a Domino facility and also a
14:37:43 5 Cargill facility, and then you see sugar flowing out in the
14:37:47 6 red arrow that's pointing up into the northeast.

14:37:50 7 Q. Is it relevant whether the proposed geographic market
14:37:53 8 has distinct prices?

14:37:55 9 A. It is.

14:37:56 10 Q. Why is that?

14:37:58 11 A. So distinct prices, Your Honor, give an indication
14:38:01 12 that it is feasible to raise prices in a particular area.
14:38:04 13 So when you're applying a geographic price discrimination
14:38:07 14 market, the hypothesis is the price is going to rise there
14:38:10 15 to those customers and not elsewhere. So, a past history of
14:38:13 16 prices being significantly different across regions or areas
14:38:16 17 tells you yes, that looks like it happens in the ordinary
14:38:19 18 course of the industry.

14:38:21 19 Q. What evidence have you seen with respect to whether
14:38:24 20 Dr. Rothman's proposed market have distinct prices?

14:38:27 21 A. So if we please advance one more slide. Here, Your
14:38:30 22 Honor, we have prepared two charts and we're comparing the
14:38:33 23 first table here is comparing prices in Dr. Rothman's
14:38:36 24 regions in 2021 to pricing in the bordering states. So any
14:38:39 25 state that borders that region.

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14:38:52 1 So if you look at the Georgia plus region, for
14:38:55 2 example, the first column shows you the average price for
14:39:00 3 hundredweight in that region in 2021, and then the next
14:39:03 4 column shows the average price in boarding states and then
14:39:07 5 the end shows the percentages.

14:39:09 6 What we see in the first table here is there is
14:39:11 7 no meaningful differences in prices between the states in
14:39:15 8 Dr. Rothman's regions and the states that border it. And
14:39:18 9 the second figure, the second table here is performing the
14:39:21 10 same exercise but it's comparing the states in Dr. Rothman's
14:39:25 11 regions to states outside of Dr. Rothman's regions. So we
14:39:29 12 look at a broader comparison group of states. And again, we
14:39:33 13 are not seeing significant indifferences.

14:39:36 14 THE COURT: That is every other state in the
14:39:40 15 country.

14:39:40 16 THE WITNESS: That's right, Your Honor. I tried
14:39:44 17 to do it two ways. You have the bordering states to try to
14:39:48 18 look at the ones that are very close by and then say what
14:39:49 19 about if you look at all the states.

14:39:51 20 Q. Is it relevant whether prices equalize nationally?

14:39:54 21 A. It is.

14:39:57 22 Q. Why is that?

14:39:59 23 A. So this was the similar to the example I was talking
14:40:03 24 about earlier, Your Honor, if you have evidence of price
14:40:06 25 seeming to adjust on a national basis, it suggests that it

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14:40:06 1 is not going to be feasible to raise the price in a specific
14:40:10 2 part of the country if prices are reorganizing themselves
14:40:15 3 nationally.

14:40:15 4 Q. Are you aware of a natural experiment that can be
14:40:18 5 used to test this?

14:40:19 6 A. Sure. If you could please advance one more slide.

14:40:22 7 Here, Your Honor, we're looking at the beet
14:40:24 8 freeze which you heard a lot about at this point. It's
14:40:28 9 represented by the thick black line, vertical line. That's
14:40:32 10 the date of the onset of the beet freeze. And these are
14:40:36 11 United's refined sugar prices broken out by something called
14:40:41 12 the USDA regions.

14:40:43 13 So what we're showing in the figure here, you
14:40:46 14 can see the onset of the beet freeze and prices don't seem
14:40:50 15 to change differentially in the blue line which is north
14:40:54 16 central which is the area in which there was a significant
14:40:57 17 reduction in output. If prices were highly regionalized and
14:41:01 18 regions have very different pricing, you would expect to see
14:41:05 19 that when the supply fell substantially in the north central
14:41:09 20 prices there would rise, because they lost that supply but
14:41:13 21 they wouldn't rise elsewhere. Instead what we see is prices
14:41:17 22 across the country adjusting.

14:41:19 23 Q. And this chart refers to United. Did you look at
14:41:23 24 other firms prices?

14:41:26 25 A. I did.

Hill - direct

14:41:25 1 Q. What does that show?

14:41:26 2 A. I also looked at prices for Cargill, for Imperial,
14:41:29 3 and for ASR. And so for those firms, I saw a similar
14:41:35 4 pattern of prices. I looked at a combination of those four.
14:41:38 5 I saw prices nationally seemed to adjust nationally rather
14:41:43 6 than regionally.

14:41:43 7 Q. Dr. Rothman criticizes your analysis of the beet
14:41:48 8 freeze. He says you did not show that the beet freeze had
14:41:51 9 any discernible affect on prices and you did not perform any
14:41:54 10 statistical analysis to show such an affect. Do you agree?

14:41:54 11 A. No. So Your Honor, Dr. Rothman in his reply report
14:42:03 12 made those criticisms, and after I read his reply report, I
14:42:08 13 did a simple difference-in-difference regression which is a
14:42:11 14 statistical technique to test whether prices did adjust
14:42:15 15 nationally, and the results of the test were that they did.

14:42:21 16 MR. STRONG: Your Honor, we have need to object
14:42:24 17 that testimony. That's not in Dr. Hill's report and we
14:42:27 18 learned about that for first time in his deposition.

14:42:30 19 THE COURT: You were able to ask him about it at
14:42:32 20 his deposition?

14:42:32 21 MR. STRONG: Yes, but we didn't get his backup
14:42:36 22 data until later that afternoon. It's basically impossible
14:42:38 23 to cross him on it.

14:42:40 24 MR. BARBUR: Your Honor, we provided the backup
14:42:42 25 data as soon as we could. We had just received

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14:42:45 1 Dr. Rothman's reply report and then we had Dr. Hill's
14:42:50 2 deposition schedule. He did testify about it and they do
14:42:52 3 have the backup.

14:42:55 4 THE COURT: Okay. I going to overrule the
14:42:58 5 objection because things are moving so fast and you did have
14:43:00 6 an opportunity to discuss that at his deposition.

14:43:00 7 BY MR. BARBUR:

14:43:04 8 Q. Dr. Rothman also says that your data show notable
14:43:08 9 differences in prices across regions. Do you agree?

14:43:12 10 A. I do not.

14:43:13 11 Q. Why not?

14:43:14 12 A. So the, Dr. Rothman presented in his reply reports a
14:43:18 13 graph of, I think he showed United's prices by region. But
14:43:23 14 two points that I think are important there. The first is
14:43:27 15 he does those by USDA region. He doesn't anywhere in his
14:43:31 16 reply report argue that there is evidence that prices vary
14:43:34 17 in his regions to or proposed markets vis-a-vis the rest of
14:43:37 18 the country.

14:43:38 19 And then second, in his reply report he simply
14:43:42 20 produces a graph of United's prices. He doesn't look at
14:43:46 21 prices in a region as a whole. I think it's important as I
14:43:50 22 did with his region to look at aggregate pricing in the
14:43:53 23 region as a whole.

14:43:54 24 Q. Have you ever testified in a case where you did
14:43:56 25 observe distinct pricing across regions?

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14:44:01 1 A. I testified in the FTC versus Tronox and Cristal
14:44:06 2 matter, Your Honor, I defined a price discrimination market
14:44:10 3 of North America. This was a case involving titanium
14:44:14 4 chloride dioxide, which is a kind of chemical. So there I
14:44:19 5 defined North America as a relevant price discrimination
14:44:21 6 market. There, we had a number of factors that are not
14:44:26 7 present here.

14:44:26 8 First, in the titanium dioxide industry there is
14:44:31 9 broad recognition above North America as a separate region
14:44:34 10 of interest.

14:44:35 11 Second, prices in North America vary
14:44:39 12 significantly compared to other regions and over time it was
14:44:43 13 as high as 20 percent above other regions.

14:44:46 14 Third, there we had a natural experiment,
14:44:49 15 unfortunately a plant in Europe caught fire and had to shut
14:44:53 16 down, so there was a significant reduction in production in
14:44:56 17 Europe. And what happens was prices rose very sharply in
14:45:01 18 Europe, but they didn't rise as sharply at home, so the
14:45:05 19 prices didn't equalize across the region. I should note,
14:45:07 20 Chloride Titanium dioxide, there are functionally no imports
14:45:12 21 of chloride titanium dioxide into North America.

14:45:12 22 Q. Let's turn to Dr. Rothmans use of the hypothetical
14:45:14 23 monopolist test. Can you describe that test for the Court?

14:45:21 24 A. Sure.

14:45:22 25 So the hypothetical monopolist test, Your Honor,

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14:45:25 1 asks, if there was just a single supplier, would that
14:45:30 2 supplier merge with all its current competitors into one and
14:45:34 3 then you ask the question, would that monopolist have an
14:45:39 4 incentive to raise price--the incentive and the ability to
14:45:43 5 raise prices, it's commonly used to try to define a market.

14:45:48 6 Q. How does Dr. Rothman rely on the hypothetical
14:45:51 7 monopolist test?

14:45:51 8 A. Dr. Rothman asserts that he performed a hypothetical
14:45:56 9 monopolist test for his markets and so they are valid
14:45:59 10 markets.

14:45:59 11 Q. In your view, is it appropriate to rely only on the
14:46:03 12 hypothetical monopolist test in defining a markets?

14:46:05 13 A. No, I think it's better to rely on all of the
14:46:08 14 evidence including the hypothetical monopolist test, so for
14:46:12 15 example, the Tronox case I was talking about, we had the
14:46:14 16 other evidence and then we had the hypothetical monopolist
14:46:16 17 test. So sort of the facts of the industry were sort of a
14:46:20 18 check on hypothetical monopolist test.

14:46:21 19 Q. Dr. Rothman says that the hypothetical monopolist
14:46:25 20 test shows that his market is not too narrow. Do you agree?

14:46:30 21 A. I do not. I think his test is flawed.

14:46:32 22 Q. What are the categories of flaws?

14:46:33 23 A. So I think the key problem with his test, he didn't
14:46:37 24 adequately consider arbitrage across the regions. I see the
14:46:41 25 slide are down which is unfortunate. Great.

Hill - direct

14:46:47 1 Here are three areas of arbitrage that I think
14:46:52 2 he didn't adequately account for. So, the first is imports
14:46:55 3 that are currently going to other parts of the country, Your
14:46:58 4 Honor, could be redirected into Dr. Rothman's proposed
14:47:01 5 markets.

14:47:02 6 Second, there are many customers in
14:47:04 7 Dr. Rothman's proposed markets that have customer locations
14:47:07 8 outside of those regions. So those customers could purchase
14:47:11 9 for those locations outside of the proposed markets and move
14:47:15 10 and then just arrange transportation to move it into the
14:47:18 11 proposed markets.

14:47:19 12 And then finally today, many customers inside
14:47:22 13 Dr. Rothman's proposed markets purchase at the location of
14:47:26 14 the supplier and then arrange transportation themselves.
14:47:30 15 Those customers who already today are purchasing at the
14:47:33 16 location of the supplier could purchase at suppliers outside
14:47:36 17 the regions at the lower price and then arrange
14:47:39 18 transportation to move it into the regions.

14:47:42 19 Q. Let's focus on imports and look at the next slide.
14:47:45 20 What is this showing?

14:47:48 21 A. Sure. So here, Your Honor, we're looking at refined
14:47:51 22 sugar imports into other regions of the United States in
14:47:54 23 2020. So on the left we have Dr. Rothman's Georgia plus
14:47:57 24 region, and so in green what I am showing here is total
14:48:00 25 sales in that region in 2020. So they were about 34 million

Hill - direct

14:48:06 1 hundredweight. And then the blue bar is showing total
14:48:09 2 imports into the U.S., into other parts -- sorry, total
14:48:14 3 imports into other parts of the United States. So it's
14:48:19 4 around 18 million hundredweight.

14:48:20 5 And Dr. Rothman doesn't consider the possibility
14:48:25 6 that customers could purchase imports outside the market and
14:48:30 7 redirect them into the Georgia plus region. So you know,
14:48:35 8 the hypothetical test here is prices going up by five to ten
14:48:41 9 percent, would customers try to get imports to redirect
14:48:44 10 other parts of the country into the Georgia plus region, you
14:48:48 11 have the same thing in the southeast region.

14:48:51 12 Q. Can you explain why you think that Dr. Rothman does
14:48:55 13 not properly account for the ability of customers to pick up
14:48:59 14 refined sugar at locations outside of his regions?

14:49:04 15 A. Sure. So, Your Honor, today something on the order
14:49:08 16 in both Dr. Rothman's regions, 30 to 35 percent of customers
14:49:11 17 pick up at their supplier. Indeed, today when prices are
14:49:14 18 equalized across all the regions, three percent of customers
14:49:18 19 purchase at a supplier location outside of Dr. Rothman's
14:49:21 20 regions and move it in. So today we already observed this
14:49:25 21 behavior. But Dr. Rothman rules it out as a significant
14:49:28 22 source of arbitrage.

14:49:31 23 Q. Does Dr Rothman account for customers with locations
14:49:35 24 outside of his markets?

14:49:38 25 A. Not fully, no, he does not. Dr. Rothman argues that

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14:49:40 1 few customers in his regions have locations outside of the
14:49:44 2 market. So he argues most of them are contained within his
14:49:48 3 regions. That's true if you count based on the number of
14:49:52 4 customers. But if you weight customers by volume, by the
14:49:56 5 amount they're actually purchasing in the Georgia plus or
14:49:59 6 southeast region, more than 75 percent of purchases in
14:50:03 7 Dr. Rothman's regions are made by customers who have a
14:50:07 8 location outside of the market.

14:50:08 9 And I believe on the first day of this
14:50:11 10 proceeding, Your Honor, Mr. Riippa from General Mills
14:50:15 11 testified that General Mills has the ability under its
14:50:18 12 contracts to redirect purchases from one part of the country
14:50:21 13 to another if it wishes. That's exactly the sort of
14:50:24 14 redirecting they can use to defeat. If you told General
14:50:30 15 Mills it's going to be ten percent higher, if you want to
14:50:33 16 purchase this from Georgia plus or southeast but the old
14:50:38 17 price is less in Texas, you think they would be able to
14:50:41 18 purchase it in Texas and ask for it to be redirected.

14:50:44 19 Q. Let's turn to HHI because you have explained for the
14:50:50 20 Court what an HHI is?

14:50:52 21 A. HHI stands for the Herfindahl-Hirschman Index. It's
14:51:01 22 something that economists use to evaluate concentration in a
14:51:04 23 market.

14:51:06 24 Q. And are you familiar with the presumption concerning
14:51:11 25 HHI, the horizontal merger guidelines?

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14:51:14 1 A. Yes. So, Your Honor, the 2010 Horizontal Merger
14:51:19 2 Guidelines say if a merger significantly increases
14:51:22 3 concentration and results in a highly concentrated market
14:51:26 4 then it presumed to create market power. By significantly
14:51:29 5 increasing concentration, the guidelines mean there is
14:51:34 6 200 points or more increase in the HHI value and highly
14:51:37 7 concentrated means the HHI for the market as a whole is
14:51:41 8 above 2,500.

14:51:42 9 Q. The HHI regional level where the structural
14:51:47 10 presumption applies, does that mean that the merger is
14:51:51 11 necessarily anticompetitive?

14:51:52 12 A. It does not. The HHI calculations are something that
14:51:56 13 one does early in a case to try to determine is it likely
14:52:00 14 that there will be an effect here, but one still has to do
14:52:03 15 the full competitive effects analysis.

14:52:05 16 Q. Do you believe that this transaction leads to a
14:52:09 17 presumption of a properly defined market?

14:52:12 18 A. I do not.

14:52:12 19 Q. Why not?

14:52:13 20 A. As I said, I think Dr. Rothman's market has been
14:52:16 21 defined too narrowly. I think if you expand his market
14:52:20 22 definition, then it will result in markets, more plausible
14:52:24 23 markets, in which the presumption does not apply.

14:52:24 24 Q. Let's turn to the next slide.

14:52:25 25 Did you examine alternative potential markets to

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14:52:32 1 Dr. Rothman?

14:52:33 2 A. I did. I looked at two as I mentioned earlier, one
14:52:37 3 here is the United States and one is the competitive overlap
14:52:40 4 region. The second, is one where I looked at the areas
14:52:43 5 today in which Imperial made substantial sales. So overlaps
14:52:48 6 with, competes with United.

14:52:50 7 Q. And in your view is it logical to, does it define a
14:52:54 8 market based on where the parties compete?

14:52:56 9 A. If you're trying to assess whether transactions are
14:53:00 10 likely to affect competition, it can be a reasonable to
14:53:03 11 define the market in which they overlap.

14:53:06 12 Q. Are you aware of any cases where the Department of
14:53:10 13 Justice has defined a market based on the competitive
14:53:14 14 overlap?

14:53:17 15 A. I worked on a case in 2010 when I was at the Division
14:53:21 16 of Dean Foods case, where Dean Foods, Your Honor, purchased
14:53:25 17 some milk processing plants in the upper midwest. And there
14:53:29 18 the geographic market was defined around the area in which
14:53:33 19 foremost which was where the smaller of the two firms had
14:53:37 20 substantial sales.

14:53:41 21 Q. What is the significance of that case for this case?

14:53:45 22 A. I mean, I think the definition that the United States
14:53:49 23 used there was reasonable in that case and I think it's
14:53:53 24 reasonable here as well.

14:53:57 25 Q. Do either of your alternative markets lead to a

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14:53:52 1 presumption?

14:53:53 2 A. No, they do not. So here, Your Honor, this chart is
14:53:57 3 looking at the -- whether the presumption applies in these
14:54:00 4 plausible alternative markets. So on the horizontal axis
14:54:06 5 here, you have the HHI with the merger, this is the post
14:54:09 6 merger HHI. And then on the vertical axis, you have the
14:54:14 7 increase in HHI that would occur due to the transaction.

14:54:17 8 And then I plotted them, so the light green are
14:54:21 9 areas in which the presumption did not apply. And the white
14:54:25 10 are the areas in which the presumption would apply. And
14:54:28 11 then the dots, the circular dots are all United States and
14:54:31 12 the squares are competitive overlap. And then green is
14:54:34 13 2020, and red is 2021. And you can see for both plausible
14:54:41 14 alternative markets in both years, the structural
14:54:44 15 presumption would not apply.

14:54:48 16 Q. Let's turn to unilateral effects. What do economists
14:54:51 17 typically look at what they're examining unilateral effects?

14:54:54 18 A. So economist typically look at evidence of
14:55:01 19 head-to-head competition between the parties.

14:55:02 20 Q. Does it matter how close the competition is?

14:55:05 21 A. It is usually unlikely that there will be a
14:55:10 22 significant unilateral effect if competition is not close.

14:55:14 23 Q. And is it typical to analyze whether any factors may
14:55:17 24 mitigate any other anticompetitive effects?

14:55:22 25 A. Yes, typically one looks at whether a competitive

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effect will be mitigated by entry or expansion, so existing or new firms taking a more aggressive position in the market. It typically looks at efficiencies, where the transaction would make the merged firm a more aggressive competitor.

And also there may be other mitigating factors such as here the fact that Dr. Rothman and I following him, assume that US Sugar and United are single decision making entity, and here also the role of the USDA can be a potential mitigating factor.

Q. You mentioned entry and expansion. Why is that important?

A. So if the merged firm attempted to raise prices and other competitors would expand their production or enter the market in response, it could defeat any attempt to raise price by making it unprofitable for the merged firm to try to raise the price.

Q. Is there any evidence in this case of entry and expansion in the sugar industry?

A. Yes, Your Honor, I'm aware of at least four important examples of entry and expansion. So the first is Cargill/LSR a producer in Louisiana in Gramercy who has expanded in the past and are again in the process of expanding their production. Second, Sucro Sourcing is building a new facility. Cargill expanding, Sucro Sourcing

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14:56:54 1 is building a new refinery in Upstate New York, just opening
14:56:56 2 a refinery.

14:56:56 3 Michigan Sugar is in the process of making
14:56:59 4 capital improvements to keep up with its current production.
14:57:03 5 There is firm known as CSC who you may have heard about in
14:57:07 6 testimony who have expanded in the recent past and shown a
14:57:11 7 willingness to building plants close to customers to try to
14:57:16 8 service them.

14:57:17 9 Q. Turn to the next slide --

14:57:19 10 THE COURT: Oh, that last slide, go back for one
14:57:21 11 second. The dots that you have in there, is that using your
14:57:31 12 product market?

14:57:31 13 THE WITNESS: This is -- Your Honor, this is
14:57:37 14 using Dr. Rothman's product market.

14:57:39 15 THE COURT: You're using his product market, the
14:57:42 16 production and sale of refined sugar?

14:57:45 17 THE WITNESS: That's correct, Your Honor. Here
14:57:46 18 I'm following him and his treatment of US Sugar and United
14:57:49 19 as a single entity. I'm following him in not giving
14:57:54 20 distributors any market share.

14:57:56 21 THE COURT: So this is the only difference here
14:57:58 22 is that you expanded the geographic market?

14:58:02 23 THE WITNESS: That's correct, Your Honor.

14:58:03 24 BY MR. BARBUR:

14:58:04 25 Q. And on that HHI chart, you include distributors here?

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14:58:09 1

A. I do not.

14:58:12 2

Q. And do you use Dr. Rothman's product market or your product market?

14:58:16 3

14:58:17 4

A. I'm using Dr. Rothman's product market.

14:58:20 5

Q. Thank you.

14:58:28 6

Did you consider other mitigating factors?

14:58:31 7

A. See if I may briefly, we were on this slide.

14:58:36 8

Q. I am sorry.

14:58:36 9

A. So you asked me what does this chart show, I think.

14:58:40 10

So this is CSC's actual sales in the southeast. And the

14:58:44 11

point I was making here, Your Honor, is just you can see in

14:58:48 12

2017, since 2017, CSC has significantly increased its sales.

14:58:51 13

Q. Focusing on other mitigating factors, do you think the role of the USDA is important?

14:59:02 14

14:59:03 15

A. I do.

14:59:04 16

Q. Why?

14:59:05 17

A. I think we heard testimony from Dr. Fecso that the

14:59:09 18

USDA may take action to try to mitigate price increases.

14:59:14 19

And so firms in the market, think more broadly, we heard a

14:59:19 20

good deal of testimony from industry participants that they

14:59:23 21

spent a lot of time thinking about what USDA is doing. I

14:59:28 22

interpret that as evidence that USDA actions are important

14:59:32 23

and do affect prices if in this industry.

14:59:37 24

And I think it's reasonable to take account of

14:59:41 25

the fact that the USDA, the prices, if the merged firm were

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14:59:38 1 to attempt to raise prices, the USDA might take action and
14:59:44 2 the merged firm might take that possibility of action into
14:59:48 3 consideration.

14:59:49 4 Q. What's your understanding of the tools that the USDA
14:59:52 5 has at its disposal?

14:59:55 6 A. I think broadly speaking, USDA has a number of tools,
14:59:58 7 but the one I think of, Your Honor, as you heard Dr. Fecso
15:00:03 8 testify, is the ability to increase imports and it also has
15:00:06 9 the ability to adjust allotments, so move allotments from
15:00:11 10 one firm to another or imports to increase the supply of
15:00:15 11 sugar.

15:00:15 12 Q. Have you seen examples of where the USDA has done
15:00:19 13 that in past?

15:00:19 14 A. So certainly during the 2020 beet freeze as Dr. Fecso
15:00:24 15 testified, USDA increased the amount of imports, lower duty
15:00:29 16 imports.

15:00:31 17 Q. Do you think it's important to account for
15:00:34 18 efficiencies when assessing unilateral effects?

15:00:38 19 A. Yes.

15:00:39 20 Q. Why is that?

15:00:41 21 A. Efficiencies that result from a transaction, may give
15:00:44 22 the merged firm the incentive to compete more aggressively
15:00:48 23 than the stand-alone firms have.

15:00:50 24 Q. What efficiency have you identified here?

15:00:52 25 A. I think I see three broad efficiencies. I think we

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1 have seen testimony about the fact that today US Sugar has
2 more raw sugar than it can refine and post transaction
3 intends to re-divert some of that raw sugar to Port
4 Wentworth where Imperial's production facility is located.

5 I think second, US Sugar has been able to expand
6 production at US Sugar's Clewiston refinery by a significant
7 amount. And I think it will try to do the same at Port
8 Wentworth.

9 And finally, today United may be serving some
10 customers that are located closer to Imperial, Imperial may
11 be serving some customers that are closer to United. Post
12 merger the merged firm could re-optimize and serve customers
13 more efficiently.

14 Q. Let's turn to the next slide. I think we saw a
15 similar one this morning. What is this showing?

16 A. This chart is looking at the increase in Clewiston's
17 annual output by fiscal year compared to 2015, Your Honor.
18 So each bar if you look at the 2016 bar, it's showing you
19 the percentage increase in output that year compared to 2015
20 for Clewiston. And the point here is just -- and I believe
21 you heard testimony about it this morning that Clewiston
22 starting back in 2006 has been able to roughly double its
23 total production at Clewiston.

24 Q. Does Dr. Rothman consider efficiencies at all in
25 analyzing unilateral effects?

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15:02:31 1 A. I would say he thinks that there will not be
15:02:34 2 efficiencies, so he doesn't include efficiencies in his
15:02:37 3 analysis.

15:02:37 4 Q. What is the effect of that approach?

15:02:40 5 A. I think that over states -- I think that tends to
15:02:42 6 overstate the competitive effects, because I think it is
15:02:46 7 likely to have efficiencies.

15:02:47 8 Q. What is the effect of the fact that Dr. Rothman
15:02:50 9 treats United as an relevant decision maker?

15:02:53 10 A. I think that has a similar affect. The members of
15:02:56 11 United do not have perfectly aligned incentives. And
15:03:00 12 treating them all as a single unitary decision maker will
15:03:04 13 tend to have the effect of overstating the likelihood of
15:03:08 14 anticompetitive effects.

15:03:10 15 Q. Does Dr. Rothman analyze whether customers switch
15:03:14 16 between United and Imperial?

15:03:15 17 A. He does.

15:03:17 18 Q. And do you agree with his analysis?

15:03:19 19 A. No, I think that analysis is flawed.

15:03:21 20 Q. Let's take a look at the next slide. Could you walk
15:03:24 21 the Court through this one?

15:03:26 22 A. Sure.

15:03:28 23 So this is looking at a plant owned by Pepsi
15:03:31 24 Company in Kissimmee, Florida. And on the left we have its
15:03:34 25 purchases from United in 2018 and 2020, and these are the

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15:03:39 1 years that Dr. Rothman compares in his report when he's
15:03:42 2 looking at switching. So you can see that, Your Honor, that
15:03:45 3 in both years United is the lion share of supply at this
15:03:50 4 plant. And Imperial supplies very, very little at this
15:03:55 5 plant. There is de minimus amount in both years. But
15:04:00 6 Dr. Rothman considers this a switch from United to Imperial
15:04:05 7 and includes it in his analysis because United's sales fell
15:04:07 8 by a small amount and Imperial went up by a very small
15:04:13 9 amount. I don't think that's the right way to look at it.

15:04:15 10 Q. Let's go to the next slide.

15:04:17 11 Is this another example?

15:04:18 12 A. Yes. Here, Your Honor, we're looking at Kraft Foods'
15:04:21 13 location in Dover, Delaware. You can see here United
15:04:25 14 increased its sales from 2019 to 2020 at this location. But
15:04:29 15 because Imperial also increased its sales, this goes into
15:04:33 16 Dr. Rothman's analysis as a switch from United to Imperial,
15:04:37 17 and again, I don't think that's the correct way to do this.

15:04:40 18 Q. Aside from these examples, do you think that
15:04:42 19 Dr. Rothman's switching analysis is sound?

15:04:45 20 A. I don't think it is. Here is a table summarizing
15:04:48 21 that switching analysis. So the first column here, Your
15:04:51 22 Honor, just a brief word here. When we say diversion here,
15:04:53 23 what we're saying is if a hundred customers left Imperial,
15:04:56 24 how many of them would go to United. That's a way to think
15:05:00 25 about what you're seeing.

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15:05:05 1 And if you look here, we're looking at the
15:05:07 2 diversion from 2018 to 2020. 2018 to 2019 and 2019 to 2020.
15:05:14 3 In his report Dr. Rothman presents 2018 to 2020 and says
15:05:19 4 this is evidence of significant diversion between parties.
15:05:22 5 If you break it down year by year, you can see that in 2018
15:05:26 6 to 2019 reading across the Georgia plus region, Dr.
15:05:32 7 Rothman's methodology predicts that if a hundred customers
15:05:35 8 left Imperial, 130 would join United. That's not feasible.
15:05:39 9 There is only a hundred customers to allocate.

15:05:42 10 If you look at 2019 to 2020, again Dr. Rothman
15:05:45 11 looking at the competitive overlap said that if a hundred
15:05:48 12 customers left Imperial, minus 29 of them would join United,
15:05:51 13 which doesn't make sense. I don't think the switching
15:05:54 14 methodology is right.

15:05:57 15 Q. Let's turn to the model, what is a GUPPI?

15:06:00 16 A. The GUPPI stands for Generalized Upper Pricing
15:06:03 17 Pressure Index.

15:06:06 18 Q. Is a GUPPI value a predicted price increase?

15:06:11 19 A. No, a GUPPI value, Your Honor, is a measure of upward
15:06:14 20 price pressure.

15:06:17 21 Q. Does a GUPPI or does Dr. Rothman's GUPPI model take
15:06:20 22 account of entry, expansion, efficiencies or any other
15:06:23 23 mitigating factors?

15:06:26 24 A. It does not.

15:06:29 25 Q. And does a small GUPPI value indicate that prices are

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15:06:33 1 likely to increase?

15:06:34 2 A. It does not. So because the GUPPI framework doesn't
15:06:38 3 take account of mitigating factors, typically small values,
15:06:43 4 small GUPPI values are interpreted as not being significant
15:06:48 5 evidence. So one of the creators of the model, Dr. Carl
15:06:53 6 Shapiro when he was at DOJ, had a rule if the GUPPI was
15:06:59 7 below five percent, he thought that was not likely to be
15:07:01 8 significant evidence of price issue. Because the model did
15:07:04 9 not take into account other mitigating factors.

15:07:07 10 THE COURT: Are there always mitigating factors?

15:07:09 11 THE WITNESS: No, not always.

15:07:11 12 Q. Let's take a look at the next slide. What are we
15:07:14 13 showing?

15:07:14 14 A. Looking at Dr. Rothman's reply report, we're looking
15:07:17 15 at the GUPPIs for the combined firm. So the left we have
15:07:21 16 the Georgia plus market and on the right we have the
15:07:24 17 southeast market. So in blue, we have Dr. Rothman's GUPPI
15:07:29 18 based on state shares and on the right we have GUPPI based
15:07:35 19 on switching analysis. You can see the merged firm's GUPPI
15:07:39 20 in each case is below this five percent.

15:07:42 21 Q. How do you go about translating a GUPPI value to a
15:07:46 22 price effect?

15:07:48 23 A. So, Your Honor, you make another assumption about how
15:07:52 24 likely it is, or what percentage of a price increase would
15:07:55 25 be passed through by the firm to its customers.

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15:07:58 1 Q. And what pass through rates does Dr. Rothman use?

15:08:02 2 A. So he uses pass through rates associated with linear
15:08:09 3 demand. Linear demand assumes that 50 percent of a price
15:08:12 4 increase will be passed through. Logit is more complex, but
15:08:17 5 it's safe to say here that it assumes more than 50 percent
15:08:20 6 will be passed through.

15:08:21 7 Q. Does Dr. Rothman do any analysis to support those
15:08:24 8 numbers?

15:08:24 9 A. No.

15:08:25 10 Q. He just assumes them?

15:08:27 11 A. That's correct.

15:08:30 12 Q. Would Dr. Rothman predicted price increases decrease
15:08:35 13 further if he used use a lower pass through rate?

15:08:37 14 A. Yes. So, Your Honor, there is a 1 to 1. If you
15:08:40 15 decrease the pass through rate, the smaller the pass through
15:08:44 16 rate gets the smaller the price effect associated with
15:08:47 17 GUPPI. So if your pass through rate is 0 percent, you can
15:08:50 18 have any GUPPI you want and there is no price effect. If
15:08:53 19 you have a 100 percent pass through then a GUPPI is
15:08:57 20 equivalent to a price increase.

15:09:00 21 Q. Let's turn to Dr. Rothman's other model. What is
15:09:03 22 that model?

15:09:04 23 A. Dr. Rothman other model is what he calls the
15:09:07 24 second-score bidding model.

15:09:07 25 Q. And how does that work?

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15:09:09 1 A. In the second score bidding model, the idea is
15:09:14 2 customers purchase their sugar by auction, procurement
15:09:17 3 auction and they ask suppliers to submit bids, they rank the
15:09:23 4 suppliers according to various characteristics including
15:09:27 5 price and they choose the supplier with the highest score.
15:09:31 6 And then the price is set based on how close the second
15:09:36 7 closest supplier was to the supplier with the highest score.

15:09:42 8 Q. And do you think that Dr. Rothman's second-score
15:09:45 9 bidding model is reliable?

15:09:46 10 A. In this industry, I think that it is not.

15:09:49 11 Q. Can you explain why?

15:09:50 12 A. Sure. So in the second score bidding model, Your
15:09:54 13 Honor, there are sort of two key inputs. The first is
15:09:58 14 margins and the second is something to capture switching or
15:10:02 15 diversion. So here what Dr. Rothman was testifying
15:10:05 16 yesterday, he relied upon state shares to calculate his
15:10:09 17 diversions, so you have margins and some measure of
15:10:13 18 diversion.

15:10:14 19 The model takes the margins that are fed to it
15:10:18 20 and then it predicts margins for the firms in this industry
15:10:22 21 and the author of the paper that introduced this methodology
15:10:25 22 said first check on the validity of the model is whether the
15:10:29 23 actual margins match the predicted margins. For
15:10:33 24 Dr. Rothman's model the actual margins and predicted margins
15:10:37 25 don't match.

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15:10:38 1 Q. Go to the next slide. What is this showing?

15:10:41 2 A. So, this is a slide looking at visually, on the left
15:10:44 3 we have Georgia plus and on the right we have the southeast.
15:10:47 4 This is looking at the difference between United and
15:10:50 5 Imperial's margins. Dr. Rothman calculated margins for
15:10:53 6 United and Imperial and roughly speaking he found for United
15:10:57 7 about a 25 percent margin and Imperial about a five percent
15:11:01 8 margin. So we're looking here at the observed margins,
15:11:06 9 that's the difference between United and Imperial's margins.
15:11:09 10 So it's on the order of 16 percentage points here.

15:11:13 11 In his model the predicted margin difference
15:11:17 12 between the firms is only one percent so it predicts they
15:11:21 13 have substantially the same margin. But in fact his own
15:11:25 14 actual margins calculations show this is not the case. And,
15:11:28 15 you know, given the structure of the model, the model is
15:11:32 16 saying it takes the actual margins and it produces predicted
15:11:37 17 margins based on how its modeling competition, and the two
15:11:40 18 just don't match so it just doesn't seem to be working in
15:11:43 19 the refined sugar industry.

15:11:45 20 Q. What does it say about the reliability of his models?

15:11:48 21 A. I don't think there was much in this model that was
15:11:51 22 reliable.

15:11:52 23 Q. And in his reply expert report Dr. Rothman says you
15:11:57 24 reran this model and using United only margins and Imperial
15:12:00 25 only margins, does that resolve the problems?

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15:12:04 1 A. It did not resolve the problem. So in his initial
15:12:08 2 report, you know, Dr. Rothman gave the model a blended
15:12:12 3 margin, so he gave it a margin that combined the margins of
15:12:16 4 United and Imperial. In his reply report, he said I'm going
15:12:20 5 to do it two other ways, I'm going to give it just United
15:12:23 6 margin so see what it predicts and I'm going to give it just
15:12:27 7 Imperial margin to see what it predicts.

15:12:30 8 When he gives it just United margins, the model
15:12:33 9 matches United margins, but it gets Imperial's margins very
15:12:37 10 wrong, and when he gives it Imperials margins, it matches
15:12:39 11 Imperial margins, but it gets United margins very wrong. So
15:12:41 12 the exact same problem is present when he uses it in his
15:12:43 13 reply report as in his initial report.

15:12:48 14 Q. Setting aside all the errors that you describe, does
15:12:51 15 Dr. Rothman second-score bidding model predict significant
15:12:57 16 price increases?

15:12:58 17 A. In my opinion it does not. This slide here, Your
15:13:01 18 Honor, is taken from Dr. Rothman's initial report. Looking
15:13:04 19 at the second-score bidding model, we have a column for each
15:13:09 20 one of Dr. Rothman's regions and we have a row for each
15:13:15 21 seller. You can see that Dr. Rothman predicts three percent
15:13:18 22 for United, three to four for Imperial and then he presents
15:13:20 23 with a merged firm 3 to 4 percent. But the model doesn't
15:13:24 24 predict that other customers will see any price effect. So
15:13:28 25 if you look across all customers in his regions, the region

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15:13:32 1 wide price effects are one percent in the southeast and two
15:13:35 2 percent in the Georgia plus. So these are not significant
15:13:39 3 price effects.

15:13:42 4 Q. Did you conduct your own analysis of unilateral
15:13:46 5 effects here?

15:13:47 6 A. I did.

15:13:47 7 Q. What did you do?

15:13:47 8 A. So I did two different models, one called the bidding
15:13:51 9 model and one called the relative cost model.

15:13:54 10 Q. Did you also look at qualitative evidence?

15:13:58 11 A. I did, I also evaluated qualitative evidence and
15:14:03 12 quantitative evidence.

15:14:04 13 Q. Why is it important to do a qualitative analysis of
15:14:08 14 competition?

15:14:08 15 A. It's useful to make sure the predictions you are
15:14:11 16 making are consistent with reasonable facts.

15:14:15 17 Q. What is the qualitative evidence that you reviewed
15:14:18 18 show?

15:14:18 19 A. So if you advance one more slide please. So there
15:14:22 20 are some examples I listed in my reports, Your Honor, of
15:14:25 21 competition for customers where many other sugar refiners
15:14:28 22 were competing with United and Imperial so these are two
15:14:32 23 examples of them. The first is McKee who, among other
15:14:35 24 brands, makes Little Debbie, Little Debbie products. Here
15:14:42 25 you can see that McKee -- I will just avoid the specifics,

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15:14:45 1 just in an abundance of caution, had many other suppliers
15:14:49 2 competing to supply its business and Imperial has not been
15:14:53 3 successful in competing with this business and there is a
15:14:56 4 quote from an Imperial employee about this.

15:14:58 5 In the bottom we have Kraft Heinz, I think you
15:15:03 6 heard about the example, Your Honor, it has 37 plants in the
15:15:05 7 United States. Imperial bid for one of those plants and
15:15:09 8 three other suppliers are also competing to serve -- I'm
15:15:12 9 sorry, are serving business at that plant today.

15:15:14 10 Q. Did you analyze whether Imperial and United are close
15:15:19 11 competitors?

15:15:20 12 A. I did.

15:15:21 13 Q. What did you conclude?

15:15:22 14 A. I don't believe they're close competitors.

15:15:23 15 Q. Is there a difference between United and Imperial's
15:15:27 16 cost of raw sugar?

15:15:28 17 A. Yes. So this slide is looking at the difference in
15:15:34 18 raw -- estimated raw sugar costs for Imperial and for US
15:15:38 19 Sugar. So US Sugar is in blue on the left and Imperial is
15:15:42 20 in red on the right. And I think this is -- has been a
15:15:45 21 repeated theme. Imperial has very high costs for acquiring
15:15:50 22 raw sugar because it purchases it often imported, whereas US
15:15:52 23 Sugar produces its own raw sugar.

15:15:57 24 Q. And what is the implication of this for whether the
15:16:02 25 two firms are close competitors?

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15:16:05 1 A. I think you heard Mr. Gorrell testify that Imperial
15:16:10 2 is a high cost firm, and as such, it has difficulty
15:16:12 3 competing. I think he referred to US Sugar and United as
15:16:16 4 the vertically integrated producers.

15:16:18 5 Q. Go to the next slide. What do you put here?

15:16:21 6 A. Here again, I won't read these out of caution, but
15:16:25 7 these are quotes from industry participants confirming that
15:16:30 8 there is a view that Imperial is high cost firm due to its
15:16:39 9 high raw sugar cost.

15:16:39 10 Q. Did you also review the testimony of Jeffrey Gholson
15:16:44 11 of Brill?

15:16:45 12 A. I did.

15:16:46 13 Q. Did that support the fact that Imperial is a high
15:16:48 14 cost supplier?

15:16:49 15 A. It did.

15:16:50 16 Q. Is there a difference in the size of a customers that
15:16:53 17 Imperial and United serve?

15:16:55 18 A. There is. So this chart here is looking at the
15:16:59 19 average bulk customer size for Imperial and United in 2021.
15:17:02 20 So United is on the left and Imperial is on the right. And
15:17:04 21 you can see that United's average customer size is on the
15:17:12 22 order of twice the size of Imperial. So I think this is
15:17:14 23 consistent with the testimony that you have heard, Your
15:17:16 24 Honor, that United tends to have large long-term contracts
15:17:20 25 with its customers serving them for high volumes and

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15:17:27 1 Imperial is more likely to be competing for spot volume or I
15:17:32 2 believe the term people have used as a replacement supplier
15:17:35 3 or something along those lines.

15:17:36 4 THE COURT: So customer size doesn't mean the
15:17:38 5 size of the customer itself, it's the amount that's sold?

15:17:41 6 THE WITNESS: That's correct, Your Honor, the
15:17:43 7 amount that it's purchasing.

15:17:45 8 Q. Yesterday, Dr. Rothman identified a handful of
15:17:48 9 examples of head-to-head competition. Do you recall that?

15:17:51 10 A. I do.

15:17:51 11 Q. And to put that in perspective, how many United and
15:17:54 12 Imperial customers are there in the markets that Dr. Rothman
15:18:01 13 has defined?

15:18:03 14 A. Those numbers are in my report. I can check quickly.
15:18:09 15 I think it's about 550 for the southeast and about 430 or so
15:18:13 16 for the Georgia plus. Let me check. So for the southeast
15:18:24 17 it's 543 and for Georgia plus it's 428.

15:18:31 18 Q. Thank you.

15:18:31 19 Did you construct any models to test whether
15:18:37 20 unilateral effects were present?

15:18:39 21 A. I did.

15:18:39 22 Q. What did you do?

15:18:40 23 A. So I calculated -- I constructed two model, one was
15:18:45 24 the bidding model and the other one the relative cost model.

15:18:45 25 Q. And in your model, do you consider Imperial's raw

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15:18:53 1 sugar cost disadvantage?

15:18:55 2 A. I do not. I followed Dr. Rothman in ignoring that.

15:18:59 3 Q. And you considering distributors in your models?

15:19:01 4 A. I do not, again, following Dr. Rothman.

15:19:04 5 Q. Do you consider other mitigating factors such as USDA
15:19:08 6 and entry and expansion?

15:19:10 7 A. I do not consider those. I do, Your Honor, my models
15:19:15 8 include efficiencies, but I present my results with and
15:19:18 9 without efficiencies.

15:19:19 10 Q. Can you describe your bidding model?

15:19:23 11 A. Sure.

15:19:23 12 So, Your Honor, the bidding model at its heart
15:19:26 13 has a very simple view. It looks for a set of customers for
15:19:30 14 whom United and Imperial today are the two best options, so
15:19:33 15 they are competing head to head. And then it ask how close
15:19:37 16 is the next best alternative. If the transaction would
15:19:40 17 eliminate the competition between them, would another firm
15:19:44 18 be well placed to replace that. To do that I use
15:19:48 19 transportation costs, so I look for, for example, all the
15:19:51 20 customers United is serving and for Imperial is the best
15:19:52 21 alternative or the lowest cost transportation alternative.
15:19:52 22 I look at the transportation cost of the next best
15:20:00 23 alternative and I take that difference as a measure of the
15:20:05 24 additional price increase that would occur if Imperial no
15:20:05 25 longer competed with United and I do the same for Imperial

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15:20:13 1 customers.

15:20:13 2 Q. What are the results of your bidding model?

15:20:16 3 A. Right. So this slide here across the bottom here,
15:20:19 4 Your Honor, we have four geographic regions, the US,
15:20:23 5 competitive overlap, southeast and Georgia plus. And then
15:20:26 6 the height of the bar that's here communicates predicted
15:20:29 7 price increases. Blue is without efficiencies, and green is
15:20:34 8 with efficiencies. And so you can see that the Predicted
15:20:39 9 Price Effects here are minimal.

15:20:41 10 Q. Dr. Rothman claims that the margins in your bidding
15:20:44 11 model are unrealistically low, do you agree?

15:20:48 12 A. I do not.

15:20:49 13 Q. Why not?

15:20:50 14 A. So the bidding model does not take as an input
15:20:54 15 margins and it does not output margins, the model is really
15:20:58 16 focused on this question are customers for who United and
15:21:02 17 Imperial are the two best alternatives, how close is the
15:21:04 18 next best alternative. You can't use it to calculate
15:21:07 19 margins.

15:21:08 20 Q. Can you next describe your other model, the relative
15:21:14 21 cost model?

15:21:14 22 A. The relative cost model has a similar idea. Again,
15:21:18 23 it's this question how much competition is going to be lost
15:21:21 24 here if we remove Imperial competing with United and United
15:21:25 25 competing with Imperial. And so in that model, I start with

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15:21:30 1 micro level data on all of the customers and I ask the
15:21:35 2 question, what price is the customer paying today and how
15:21:38 3 does that vary depending upon how far away its current
15:21:43 4 supplier is from it -- I'm sorry, what its current supplier
15:21:47 5 cost to serve it is, what are the costs to serve it of the
15:21:52 6 other three best alternatives. And I also include other
15:21:55 7 factors such as the size of the customer, do large customers
15:21:59 8 get some sort of volume discount. So I'm trying to use
15:22:03 9 actual data on prices to see how that varies with
15:22:06 10 competition.

15:22:06 11 Q. And what are the results of your relative cost model?

15:22:11 12 A. The relative cost model, once I estimate the model, I
15:22:15 13 then ask the question, if I remove Imperial as a constraint
15:22:19 14 on United and I remove United as a constraint on Imperial,
15:22:23 15 by how much would prices increase. This chart has the same
15:22:26 16 structure as the previous one. We have the four geographic
15:22:29 17 regions across the bottom and then blue we have the
15:22:32 18 predicted prices with no efficiencies and in green we have
15:22:35 19 the predicted prices increases with efficiencies. You can
15:22:39 20 see whatever region we use whether we use efficiencies or
15:22:42 21 not the predicted price's increase is de minimis.

15:22:47 22 Q. So overall, how do results of your models compare
15:22:51 23 with the results of Dr. Rothman models?

15:22:53 24 A. So, Your Honor, I would say my predicted results are
15:22:57 25 lower than his. The lower end of his results and my results

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are not very distant. This chart is sort of trying to bring that together. You look at the first two - so each of the columns here, one, the first column is the Georgia plus region and the second column is the Southeast region and then I have the Hill bidding model and the Hill relative cost model. In lines three and four from Dr. Rothman's initial report I took his GUPPI model predictions, using 50 percent pass through and then I used his second score bidding model. You can see that in his initial report his results were actually not terribly dissimilar to mine. They were a little bit higher, but we're in a similar ballpark.

In Row 5 and 6 I present some results from his reply report. So between his initial report and his reply report, Dr. Rothman fixed an issue with his GUPPI formula and he moved from 2020 data to 2021 data. You can see the effect of those changes in Row 5, his GUPPI model fell from about one percent line 3 to 0.8 percent in the Georgia plus market. And in the Southeast 1 percent to 0.7 percent.

And then finally, I present on the last line, Dr. Rothman in his reply report estimated his second-score bidding model using Imperial only margins, United only margins and also combined margins. Here just to be transparent, this is one of his lowest estimates. I took his estimates for second-score bidding model using Imperial only margins and the Predicted Price Effects are actually

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below the numbers you listed here. This is not adjusting for region wide, but you can see they're 0.9 and 0.8 percent. So his estimates are higher than mine, but I would say that all of our estimates are realistically predicting very low price events.

Q. Let's turn on to next slide. What is this showing?

A. This is a slide from Dr. Rothman's presentation yesterday, and I think it's helpful for understanding in some of the differences in our results and also seeing that maybe they aren't so different after all.

So in the left-hand pane here Dr. Rothman presented yesterday that what he calls his narrower market, what I call the Georgia plus market he predicts 30.5 million in harm. In the broader or southeast market he's predicting 36.2 million in harm. He says this is from the elimination of head-to-head competition.

Below that I just translated that into a percentage price increase for his entire region and I did that by calculating what is the total volume of commerce for refined sugar in that region and I just divided his 30.5 by that volume of commerce. And you can see it's 1.9 and 1.5 percent. So again, our numbers are in a similar ballpark here.

Then on the right-hand side, Dr. Rothman said well, the first pane on the left is head-to-head

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15:26:03 1 competition, but you also need to consider the impact of
15:26:06 2 increased coordination. And here he adds his projected
15:26:11 3 price effect from the increased coordinated interaction and
15:26:14 4 he gets to this by saying he assumes that today, ASR and
15:26:19 5 United are refraining from competing with one another on ten
15:26:26 6 percent opportunities. I see no evidence to support this.
15:26:28 7 And he doesn't present any evidence to support this. Then
15:26:31 8 he says what if it increased to 30 percent as a result of
15:26:34 9 the transaction, how much additional harm would there be.
15:26:37 10 Then he adds that calculation onto the head-to-head
15:26:41 11 competition harm from the left, that's how he gets to these
15:26:45 12 numbers. I don't believe that the transaction is likely to
15:26:49 13 significantly increase coordinated interaction and I don't
15:26:53 14 think there is any evidence that today ASR and United don't
15:26:57 15 compete on ten percent. So I don't believe the estimates on
15:27:01 16 the right-hand side are reasonable. The ones on the
15:27:05 17 left-hand side as I said, they're different from mine
15:27:09 18 because he's using slightly different models, but I think
15:27:13 19 we're in a similar ballpark.

15:27:17 20 Q. Just so we're clear, these 10 percent and 20 percent
15:27:21 21 numbers, did Dr. Rothman present any analysis to support
15:27:25 22 them?

15:27:29 23 A. No, he did not. He just examined what would happen
15:27:33 24 if ASR and United didn't compete on 10 percent, 20 percent
15:27:37 25 and 30 percent of opportunities. But he doesn't explain why

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they might -- why they might not do that, how they would identify which opportunities not to compete with one another and he doesn't present any evidence that they're doing this today.

Q. Dr. Rothman has said that your model overemphasizes transportation costs. Do you agree with that?

A. So I would say that my reading of both the United States complaint and Dr. Rothman's initial report is that transportation is an important factor in competition in refined sugar. I took that seriously and built models to look at that. And I don't think that my models are overly reliant on it. What it's saying is, controlling for other factors, is it likely that someone else could step into the shoes of United and Imperial and continue to compete.

Q. Have you review evidence from third parties in this case?

A. I have.

Q. What is this showing?

A. So again, as I said at the beginning, we have here some testimony from Dr. Fecso but there is also testimony from representatives of Michigan Sugar and Domino ASR saying that they don't think the transaction is likely to significantly reduce competition.

Q. Let's talk about coordinated effects. What are coordinated effects in the context of a merger?

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15:28:48 1 A. So, a transaction is said to have a coordinated
15:28:51 2 effect if it will increase the likelihood that the firms in
15:28:55 3 the industry will agree not to compete aggressively in the
15:28:59 4 market.

15:28:59 5 Q. And what conditions typically need to be met for
15:29:03 6 coordination to be possible?

15:29:05 7 A. So coordination involves foregoing short run profits
15:29:10 8 in the hopes of getting longer run profits through
15:29:12 9 coordinating with one another. So to get to that point,
15:29:14 10 firms usually have to reach some sort of agreement be it
15:29:16 11 tacit or explicit about how they're going to coordinate.
15:29:24 12 That's one requirement.

15:29:24 13 A second is they typically need to be able to
15:29:27 14 monitor one another's behavior. And then third they need to
15:29:32 15 have some mechanism for punishing one another if someone no
15:29:34 16 longer coordinates. There is this short run incentive if
15:29:40 17 your competitors are competing softly and you compete
15:29:43 18 aggressively unexpectedly, you can steal a lot of business
15:29:47 19 from them. So typically you have to have some way of punish
15:29:51 20 them if they do that to try to stay on the straight and
15:29:54 21 narrow road.

15:29:54 22 Q. Do firms always have an incentive to coordinate?

15:30:02 23 A. No. So again, it's a trade off between the short run
15:30:03 24 incentive to cheat and to try to steal business from your
15:30:07 25 rivals and the potential long period run payoff if you all

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15:30:14 1 agree not to compete.

15:30:14 2 Q. Have you analyzed whether the characteristics of the
15:30:17 3 sugar industry make coordination likely?

15:30:20 4 A. I have. I think that the sugar industry has a number
15:30:23 5 of characteristics. I think the sugar industry has a number
15:30:27 6 of maverick firms, firms that will compete aggressively even
15:30:31 7 if it means the margin prices fall. I think that those
15:30:37 8 sharpen competition and make coordination less likely. I
15:30:41 9 think there are sophisticated customers here and I think
15:30:45 10 there is no history of past coordination.

15:30:48 11 Q. Did Dr. Rothman analyze where the transaction was
15:30:52 12 likely to increase incentives?

15:30:57 13 A. He purported to do so.

15:30:59 14 Q. What was his purported analysis?

15:31:02 15 A. Dr. Rothman used his second score bidding model and
15:31:05 16 as I said, Your Honor, he calculated what would the price
15:31:08 17 increase be if ASR and United agreed not to compete on 10,
15:31:12 18 20 or 30 percent of opportunities. And so, he then
15:31:16 19 calculated how much more money they could make if they did
15:31:19 20 that. But he doesn't explain how they would agree on which
15:31:23 21 10, 20, 30 percent not to compete on, how they would agree
15:31:27 22 on 10, 20, 30 percent, it's very short on the mechanisms.
15:31:32 23 And he also doesn't consider, he calculates the payoff, what
15:31:35 24 would be the benefit if we coordinate, but he doesn't
15:31:39 25 calculate what would be the incentive to cheat. If your

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15:31:42 1 rival thinks that you're not competing, you can steal
15:31:45 2 customers. He looks at one side of the ledger and assumes
15:31:49 3 the benefits but not the costs.

15:31:51 4 Q. Dr. Rothman says the sugar industry is conducive to
15:31:55 5 coordination because there are a small number of firms. Do
15:31:59 6 you agree with that?

15:32:00 7 A. I don't agree with that.

15:32:01 8 Q. Why not?

15:32:02 9 A. I think Dr. Rothman's conclusion there was based on
15:32:05 10 his narrow markets. In his narrow markets there is only a
15:32:10 11 small number of relevant firms. When you broaden the market
15:32:14 12 to the competitive overlap market or the national market, I
15:32:17 13 would say the sugar industry has a large number of
15:32:20 14 competitors.

15:32:20 15 Q. Dr. Rothman also claims the demand for sugar is
15:32:23 16 inelastic and this makes coordination more likely. Do you
15:32:27 17 agree with that?

15:32:28 18 A. I don't. In his initial report Dr. Rothman cited to
15:32:31 19 an academic paper that estimated the price elasticity demand
15:32:34 20 of sugar. Your Honor, the price of elasticity is, if the
15:32:40 21 price went up by ten percent, how much would customers buy
15:32:42 22 less. If something goes up in price, typically you buy less
15:32:43 23 of it. The more essential the product is, the more unlikely
15:32:52 24 it is you will substitute away from it. Oil, for example,
15:32:52 25 is inelastic. People tend to buy oil even with the price

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15:33:00 1 rises. Many other products will be elastic. Dr. Rothman
15:33:04 2 took an estimate from this academic paper and said it showed
15:33:08 3 the demand is inelastic. I don't know what happened, but he
15:33:12 4 misread the paper and, in fact, the paper shows that the
15:33:15 5 demand is elastic. So the argument that refined sugar is
15:33:20 6 inelastic is incorrect.

15:33:21 7 Q. You mentioned earlier Dr. Rothman also points to
15:33:25 8 several e-mails in support of his conclusion on coordinated
15:33:32 9 effects. Did you review those mails?

15:33:35 10 A. I did.

15:33:35 11 Q. Do those documents show actual coordination?

15:33:38 12 A. They don't.

15:33:38 13 Q. Do those documents show that the industry is likely
15:33:41 14 or vulnerable to coordination?

15:33:45 15 A. I don't believe so.

15:33:45 16 Q. Dr. Rothman points to some documents that he says
15:33:51 17 indicate interdependence on sugar suppliers. In your view,
15:33:54 18 what is the significance of those documents?

15:33:58 19 A. So here Dr. Rothman points to a small number of
15:34:02 20 documents, I believe it's five. I would say that the best
15:34:02 21 way the documents show is that competitors in the sugar
15:34:02 22 industry realize if they make strategic decisions about
15:34:12 23 price, their competitors will react to those prices. That's
15:34:12 24 not unusual in many industries.

15:34:12 25 Q. Dr. Rothman also points that he claimed to show price

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15:34:22 1 transparency as between ASR and United. Did you review
15:34:26 2 those documents?

15:34:26 3 A. Yes.

15:34:27 4 Q. And do those documents provide any support for his
15:34:30 5 theory that ASR and United will coordinate on 10 or 20 or
15:34:37 6 30 percent of transactions?

15:34:38 7 A. I don't believe so.

15:34:43 8 Q. And do those documents support the idea that the
15:34:47 9 refined sugar industry is vulnerable to coordination?

15:34:51 10 A. I don't believe so.

15:34:52 11 Q. In your deposition in this case, the DOJ asked you a
15:34:56 12 number of questions about your testimony in the Tronox case
15:35:00 13 on coordination. Do you recall that?

15:35:02 14 A. I do.

15:35:03 15 Q. Is that case like this?

15:35:04 16 A. It is not. So in that case I testified on
15:35:07 17 coordinated effects, I thought both were likely in the case,
15:35:13 18 the courts said titanium dioxide, that transaction had a
15:35:18 19 number of different features so first the transaction was
15:35:20 20 eliminating a maverick firm, a firm that was trying to
15:35:22 21 expand, this transaction does not do that. That industry
15:35:22 22 had a recent history of alleged coordination. And this
15:35:32 23 transaction, this industry does not have that. In that
15:35:32 24 industry, the parties, the firms in the industry would make
15:35:40 25 public statements when prices, when demand was falling, they

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15:35:44 1 would make public statements that we all need to
15:35:47 2 collectively work together to keep the price high. It's
15:35:50 3 important that we don't share and undercut market price.
15:35:54 4 Those were both -- I will just say they made public
15:35:58 5 statements along those lines. Again, we don't have those
15:36:01 6 kinds of documents.

15:36:04 7 MR. BARBUR: Thank you, Dr. Hill. I have no
15:36:09 8 further questions.

15:36:09 9 THE COURT: Thank you. How about before
15:36:12 10 cross-examination we take our afternoon break.

15:50:34 11 (A brief recess was taken.)

15:50:34 12 THE COURT: All right. Good afternoon. Please
15:50:36 13 be seated.

15:50:37 14 Cross-exam.

15:50:41 15 MR. STRONG: Yes, Your Honor. We thank you for
15:50:43 16 the Court's patience through here. Good afternoon. Curtis
15:50:48 17 Strong for the United States. May I proceed?

15:50:50 18 THE COURT: Absolutely.

15:50:50 19 CROSS-EXAMINATION

15:50:50 20 BY MR. STRONG:

15:50:52 21 Q. Dr. Hill, good to see you again.

15:50:53 22 A. Good to see you again, Mr. Strong.

15:50:53 23 Q. You agree that a merger, that if a merger is likely
15:50:54 24 to result in significant coordinated effects, that alone is
15:51:00 25 reason enough to block a merger, correct?

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15:51:09 1 A. Setting aside mitigating factors, yes, if you have a
15:51:15 2 strong coordinated effect.

15:51:16 3 Q. You agree with the general sentiment that coordinated
15:51:19 4 effects are possibly even if there hasn't been history of
15:51:23 5 past pricing in the industry?

15:51:25 6 A. That's true.

15:51:25 7 Q. Dr. Hill, the defendants wrote in their pretrial
15:51:29 8 brief that it is, "it is virtually unprecedented for a court
15:51:32 9 to block a merger solely on coordinated effects evidence."

15:51:35 10 Do you agree with that sentence?

15:51:36 11 A. That is a legal conclusion. I don't know if that's
15:51:39 12 true or not.

15:51:40 13 Q. As an economic theory, Dr. Hill, coordinated effects
15:51:44 14 predates unilateral effects by decades, isn't that right?

15:51:45 15 A. I would say not. Of course the Cournot model, which
15:51:54 16 I think is a unilateral effect model is from 1700 something.

15:51:55 17 Q. Unilateral effects wasn't a theory that was include
15:52:02 18 in the horizontal theory guidelines until 1982, correct?

15:52:07 19 A. I don't know that.

15:52:07 20 Q. You coauthored an article in October of 2019 entitled
15:52:13 21 Four Key Aspects of the Tronox-Cristal Litigation, correct?

15:52:17 22 A. That's correct.

15:52:18 23 Q. We looked at that article in your deposition,
15:52:20 24 correct?

15:52:20 25 A. Correct.

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15:52:21 1 MR. STRONG: Your Honor, we're not going to
15:52:23 2 enter it into evidence, but just to make it easier for the
15:52:26 3 Court and everyone to follow along, maybe we publish this to
15:52:29 4 the screen.

15:52:30 5 BY MR. STRONG:

15:52:30 6 Q. You have this in your binder at tab 5, but it may be
15:52:33 7 easier, we'll highlight it, either way. That is your name
15:52:38 8 there above paragraph 1?

15:52:42 9 A. That's correct.

15:52:42 10 Q. Let's take a look at page 8 under the section that's
15:52:46 11 titled Coordinated Effect Theories Are Alive and Well.

15:52:50 12 A. Okay.

15:52:51 13 Q. Please take a look at the third sentence in that
15:52:53 14 paragraph. Let me know when you're there.

15:52:55 15 A. Yes. Scholarly literature.

15:52:57 16 Q. It says "Scholarly literature has recognized that
15:53:01 17 coordinated effects theories have been and remain integral
15:53:05 18 to antitrust enforcement."

15:53:07 19 Is it accurate that scholarly literature has
15:53:11 20 recognized the importance of coordinated effect theories?

15:53:13 21 A. Yes, I would say so.

15:53:15 22 Q. The second clause of the sentence says that "The
15:53:17 23 relative absence of litigation of cases involving coordinate
15:53:22 24 effects theories may have led some observers to conclude
15:53:26 25 that it was no longer likely that a coordinated case might

Hill - cross

15:53:31 1 be brought, let alone one in all but the most extreme of
15:53:35 2 circumstances."

15:53:35 3 Did I read that correctly?

15:53:36 4 A. That is what the sentence says, yes.

15:53:38 5 Q. And Dr. Hill, you don't agree, do you, with the
15:53:41 6 conclusion of the observers in that sentence, correct?

15:53:44 7 A. No, Tronox was a coordinated effects, decided
15:53:49 8 coordinated effects.

15:53:50 9 Q. Let take a quick look at the final sentence of that
15:53:54 10 paragraph.

15:53:54 11 A. Sure. I'm there.

15:53:55 12 Q. The first independent clause of that sentence states,
15:54:00 13 "The Tronox case as well as a closer reading of the agency's
15:54:03 14 recent activity shows that any belief that coordinated
15:54:06 15 effects has 'died' would be misplaced."

15:54:10 16 Did I read that correctly?

15:54:12 17 A. You did, sir.

15:54:13 18 Q. You still believe that's an accurate statement,
15:54:15 19 correct?

15:54:15 20 A. Yes.

15:54:17 21 Q. One more thing from that article. If we can take a
15:54:22 22 look at page 9. There a paragraph there that begins "this
15:54:26 23 analysis." Are you there?

15:54:27 24 A. Yes.

15:54:28 25 Q. It says "This analysis reinforces the agencies need

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15:54:32 1 not to demonstrate a high likelihood of future or past price
15:54:36 2 fixing, i.e., explicit collusion to prevail on blocking the
15:54:42 3 merger, instead the agencies can prevail solely by showing
15:54:45 4 an increased risk of tacit coordination."

15:54:47 5 Did I read that correctly?

15:54:48 6 A. Yes.

15:54:49 7 Q. And you still agree with that statement, correct?

15:54:51 8 A. Yes, I think that's correct.

15:54:53 9 Q. Now, it's your testimony that the exchanges with
15:54:58 10 Mr. Wistisen in this case do not give ASR and United an
15:55:04 11 increased ability to take their competitors' actions into
15:55:07 12 account when setting prices. Have I understood your
15:55:10 13 testimony correctly, sir?

15:55:12 14 A. I don't know that I testified specifically on that
15:55:15 15 point.

15:55:15 16 Q. Okay. What would be your opinion on that point, sir?

15:55:17 17 A. So, I would say that if you look at the e-mails that
15:55:21 18 Dr. Rothman cites in his report, I guess I would make a
15:55:25 19 number of points. First, that information is available,
15:55:28 20 similar information is available from other sources. And
15:55:32 21 second, it's high level list price type information. And
15:55:35 22 third, having read all of these e-mails, the overriding
15:55:40 23 impression I got from those e-mails is that United being a
15:55:43 24 relatively aggressive competitor, there is a lot of
15:55:45 25 discussion of United taking action that Mr. Wistisen thinks

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15:55:51 1 are unusual aggressive.

15:55:53 2 Q. And that view that you just expressed just now forms
15:55:56 3 the bases, one of bases of your conclusion that there is not
15:55:59 4 likely to be coordinated effects in this case, correct?

15:56:02 5 A. I would say the bases are --

15:56:04 6 Q. Yes or no?

15:56:06 7 A. I guess I would say no.

15:56:09 8 Q. Dr. Hill, we are on a timer.

15:56:11 9 A. I would say no. The things I testified to I think
15:56:13 10 are the real basis for my conclusion.

15:56:16 11 Q. And if the Court were to conclude that United and ASR
15:56:20 12 sales teams were likely considering the information received
15:56:23 13 from Mr. Wistisen in making bids, would that show evidence
15:56:26 14 in your view of coordinated effects?

15:56:31 15 A. I would have to see the evidence.

15:56:33 16 Q. You have been here for the trial, you have watched
15:56:36 17 the evidence, correct? And you have seen the evidence?

15:56:39 18 A. I have seen some of it. I also have been reviewing
15:56:42 19 my reports so I haven't seen all of it.

15:56:45 20 Q. You may have missed some of the evidence in this
15:56:48 21 case, correct?

15:56:49 22 A. I did not see Mr. Sproull's testimony.

15:56:49 23 Q. The horizontal merger guidelines provided that
15:56:52 24 parallel accomodating conduct count for coordinated effects,
15:56:55 25 correct.

Hill - cross

15:56:57 1 A. The guideline certainly mentions parallel
15:57:00 2 accommodating conduct.

15:57:00 3 Q. You mentioned that there is not a history of past
15:57:03 4 price fixing in this industry, right?

15:57:05 5 A. I think I said there hadn't been a history of past
15:57:10 6 coordination.

15:57:11 7 Q. You are aware, though, that the United States sued a
15:57:14 8 number of sugar refineries in 1974 in the Northern District
15:57:17 9 of California for price fixing, right?

15:57:20 10 A. Right. But the guidelines say even if there is a
15:57:25 11 recent history of price fixing, conditions in the industry
15:57:28 12 have not significantly changed.

15:57:29 13 Q. You think that the conditions in the industry have
15:57:33 14 significantly changed since 1974, is that your testimony?

15:57:35 15 A. I would say conditions have significantly changed
15:57:39 16 since the suspension agreements came into effect.

15:57:40 17 Q. But sugar is still sucrose, right?

15:57:44 18 A. Correct.

15:57:45 19 Q. Sugar is still heavy in large quantities, right?

15:57:49 20 A. If you take a large amount of it, then it's heavy.

15:57:52 21 Q. Sugar is still transported by truck and rail, yes?

15:57:56 22 A. That's correct.

15:57:59 23 Q. Sugar is still made from beets and cane, right?

15:58:00 24 A. Right.

15:58:02 25 Q. And sugar refiners are still exchanging forward

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15:58:04 1 looking pricing information and sensitive information
15:58:07 2 through an intermediary; right?

15:58:10 3 A. I'm not sure that I would say the information is
15:58:12 4 sensitive. If you looked at Milling and Baking, the USDA,
15:58:16 5 there is lots of sources of information of this type.

15:58:20 6 Q. Your conclusion today is based on your opinion that
15:58:22 7 the information exchanged through Mr. Wistisen was not
15:58:26 8 sensitive information, correct?

15:58:28 9 A. My conclusion is based on the testimony I gave on the
15:58:31 10 factors that I think makes this industry unlikely to be
15:58:35 11 vulnerable to coordination.

15:58:35 12 Q. But you believe the information exchanged by ASR and
15:58:38 13 United through Mr. Wistisen is not sensitive information,
15:58:42 14 that's your testimony?

15:58:43 15 A. Yeah, I mean, look --

15:58:44 16 Q. Yes or no?

15:58:45 17 A. Yes.

15:58:46 18 Q. Okay.

15:58:46 19 A. Wait, I'm not even sure what I'm answering.

15:58:49 20 Q. Your testimony today is that the information that --
15:58:52 21 your view is that the information exchanged between ASR and
15:58:56 22 United through Mr. Wistisen is not sensitive information,
15:59:00 23 that's your testimony, yes or no?

15:59:01 24 A. I would say it's largely not competitively sensitive.

15:59:05 25 Q. You agree that the -- switching topics here for a

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15:59:08 1 second. We're going to talk about geographic market here.

15:59:12 2 You agree that geographic markets can be drawn
15:59:15 3 around customers as a general matter, right?

15:59:17 4 A. That's correct.

15:59:17 5 Q. You analyzed geographic markets based on customer
15:59:21 6 locations?

15:59:21 7 A. Correct.

15:59:22 8 Q. You remember looked at geographic markets that may
15:59:25 9 have been drawn around customers quite a bit while you were
15:59:29 10 at the Department of Justice?

15:59:31 11 A. Certainly on both Humana and the Foremost case I
15:59:35 12 looked at those markets, yes.

15:59:37 13 Q. And in this case, you agree it's acceptable to think
15:59:41 14 about defining a market around customers, right?

15:59:42 15 A. Yes.

15:59:43 16 Q. In fact, your regions are based around the location
15:59:47 17 of customers, right?

15:59:48 18 A. Correct.

15:59:50 19 Q. Relying on ordinary course documents can be a part of
15:59:54 20 a principle basis for choosing a geographic region, correct?

15:59:56 21 A. It can be part of it.

16:00:00 22 Q. And you have seen references to the southeast
16:00:04 23 generally in ordinary course documents in this case, right?

16:00:06 24 A. Correct. They do not necessarily comport with the
16:00:09 25 southeast definition of Dr. Rothman.

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16:00:12 1 Q. You put up a slide just today that showed the states
16:00:17 2 in the narrow market highlighted in red, correct?

16:00:19 3 A. That's correct.

16:00:20 4 Q. And you relied yourself on this slide to make a point
16:00:24 5 about arbitrage, right?

16:00:25 6 A. This was about sugar flowing, for sugar moving long
16:00:30 7 distances, but --

16:00:32 8 Q. That word up there at the top says arbitrage, right?

16:00:35 9 A. It does.

16:00:36 10 Q. Dr. Hill, your own report says that only three
16:00:38 11 percent of customers within the government's alleged market
16:00:41 12 pick up sugar outside of those markets; is that right?

16:00:42 13 A. Yes, I testified to that.

16:00:44 14 Q. You testified in the Tronox case in Federal Court
16:00:47 15 about geographic market, correct?

16:00:50 16 A. Correct.

16:00:52 17 Q. Let's take a quick look at that testimony and
16:00:55 18 similarly, Your Honor, may we publish it just for ease of
16:01:00 19 everyone following along.

16:01:02 20 MR. STRONG: Your Honor, may we publish to the
16:01:05 21 screen the testimony?

16:01:08 22 THE COURT: Yes.

16:01:10 23 Q. Let's go to your testimony on page 381.

16:01:13 24 A. I'm there.

16:01:15 25 Q. On line 4, you were asked if you analyzed whether

Hill - cross

16:01:22 1 there could be a global market in that case and then you
16:01:26 2 explain why not. Is that a fair characterization?

16:01:30 3 A. That's fair.

16:01:30 4 Q. You then discussed Section 4 of the horizontal
16:01:35 5 written guidelines, do you see that?

16:01:37 6 A. Yes.

16:01:38 7 Q. You testified in third sentence of that paragraph,
16:01:40 8 "what it says if you define a relevant market you should not
16:01:44 9 go further because when you define an overly broad market,
16:01:47 10 you introduce substitutes that are not actually close
16:01:51 11 substitutes and give them too much weight."

16:01:53 12 Did I read that correctly?

16:01:54 13 A. You did. But I would just interpret typically. If
16:01:57 14 you look a little further down in my testimony I said you
16:02:00 15 typically want to focus on the narrowest market.

16:02:04 16 Q. You still agree with what you said there in the
16:02:07 17 Tronox case?

16:02:07 18 A. I do.

16:02:08 19 Q. You also agree that it is not necessarily sound
16:02:10 20 economics to assume that everywhere two companies compete
16:02:12 21 must comprise a single market. That's what you told me in
16:02:12 22 your deposition correct?

16:02:12 23 A. That's correct.

16:02:12 24 Q. Companies can sell into different geographic markets,
16:02:22 25 can't they?

Hill - cross

16:02:23 1 A. They can.

16:02:24 2 Q. If a large geographic market passes the hypothetical
16:02:28 3 monopolist test, it's still possible that a smaller
16:02:31 4 geographic area might also pass the hypothetical monopolist
16:02:33 5 test, correct?

16:02:34 6 A. That's correct.

16:02:35 7 Q. Let's take --

16:02:37 8 THE COURT: Can I ask a question. You keep
16:02:39 9 saying -- I meant to ask it yesterday, pass the hypothetical
16:02:42 10 monopolist test, which way does that go?

16:02:45 11 MR. STRONG: So if the government's regions pass
16:02:47 12 the hypothetical monopolist test, in the view of the Court
16:02:50 13 we have a disagreement, but in the view of the Court then
16:02:53 14 that would mean that is an area that it would be appropriate
16:02:56 15 to calculate market shares and do the HHI calculation to
16:03:00 16 determine whether the government had a presumption of harm
16:03:02 17 in that case.

16:03:03 18 THE COURT: So passing it is -- passing is more
16:03:06 19 on the side of being a market that a monopolist would want
16:03:10 20 to monopolize?

16:03:12 21 MR. STRONG: You got it.

16:03:13 22 THE COURT: Passing it seems like, like failing
16:03:16 23 it means you're anticompetitive.

16:03:19 24 MR. STRONG: We'll take into account for the
16:03:22 25 horizontal merger guidelines.

Hill - cross

16:03:27 1 THE WITNESS: Let me just make a minor addendum.
16:03:29 2 You may have multiple markets and you may need to identify
16:03:31 3 the most relevant market, so multiple markets may pass the
16:03:34 4 test and you may have a market that's the most relevant for
16:03:37 5 analyzing competitiveness.

16:03:40 6 THE COURT: Got it.

16:03:43 7 Q. Lets take a look at Figure 11 in your report. This
16:03:45 8 is an Imperial document, right?

16:03:47 9 A. Yes.

16:03:47 10 Q. And ordinary course an Imperial document, right?

16:03:51 11 A. I believe that's right, yes.

16:03:53 12 Q. The chart references shipments by region, correct?

16:03:57 13 A. Correct.

16:03:58 14 Q. And the first region listed is the southeast region,
16:04:02 15 right?

16:04:02 16 A. That's correct.

16:04:02 17 Q. It list Alabama, Florida, Georgia, North Carolina and
16:04:07 18 South Carolina, correct?

16:04:08 19 A. That's right.

16:04:09 20 Q. And all of those are in the government's narrower
16:04:12 21 market, except that the narrower market also includes
16:04:15 22 Tennessee, correct?

16:04:16 23 A. Correct.

16:04:16 24 Q. Fifty-three percent of Imperial's sales -- we're done
16:04:20 25 with that one.

Hill - cross

16:04:20 1 Fifty-three percent of Imperial's sales are to
16:04:23 2 states in the narrower market, correct?

16:04:26 3 A. I would say to customers in the narrower market.

16:04:28 4 Q. Fair enough. Approximately two-thirds of Imperial's
16:04:31 5 sales are also to customers within the broader market;
16:04:34 6 right?

16:04:36 7 A. Yes.

16:04:38 8 Q. You're aware, aren't you, Dr. Hill, that section 4.2
16:04:42 9 of the horizontal merger guidelines says the scope of
16:04:47 10 geographic markets often depends on transportation costs,
16:04:51 11 you're aware of that?

16:04:51 12 A. I will agree with that. I am not aware of the
16:04:55 13 specific language.

16:04:55 14 Q. And we didn't look at it when we opened your Tronox
16:04:59 15 testimony, but you testified in Tronox that "the guidelines
16:05:03 16 are the best and clearest thing on how to evaluate the
16:05:07 17 likely effect of a horizontal merger. Did I get that more
16:05:11 18 or less correct in your recollection?

16:05:12 19 A. Yes.

16:05:13 20 Q. And in this case, you agree that transportation costs
16:05:17 21 and proximity to customers affect which producers supply a
16:05:21 22 particular customer location, correct?

16:05:23 23 A. I agree.

16:05:25 24 Q. Let's take a look at your Table 2 from your report.
16:05:30 25 I'm sorry, we're going to look at Dr. Rothman's Table 2.

Hill - cross

16:05:35 1 You read that Table 2 from Dr. Rothman's report, correct?

16:05:38 2 A. I did.

16:05:39 3 Q. You didn't dispute any of the figures from that table
16:05:43 4 in your report, correct?

16:05:43 5 A. Yeah, I wasn't entirely sure what to make of this
16:05:47 6 table, so I did not dispute any of it.

16:05:49 7 Q. You never even cited Dr. Rothman's Table 2 in your
16:05:53 8 entire report, correct?

16:05:54 9 A. Correct.

16:05:55 10 Q. The word backyard doesn't appear in your entire
16:05:58 11 report, correct?

16:05:59 12 A. I'll take your word for it. I don't know.

16:06:01 13 Q. You testified earlier regarding some criticisms that
16:06:04 14 you have of Dr. Rothman's hypothetical monopolist test,
16:06:07 15 correct?

16:06:07 16 A. Correct.

16:06:08 17 Q. But for all those criticisms, you didn't present a
16:06:11 18 single hypothetical monopolist test in your report in this
16:06:14 19 case, did you?

16:06:14 20 A. That's correct.

16:06:16 21 Q. You know how to run a hypothetical monopolist test,
16:06:19 22 right, Dr. Hill?

16:06:19 23 A. Yeah. But none of my competitive effects models rely
16:06:22 24 on defining a relevant market, they're all market
16:06:25 25 independent.

Hill - cross

16:06:28 1 Q. What I'm asking you is whether you know how to run a
16:06:32 2 hypothetical monopolist test?

16:06:32 3 A. I do.

16:06:33 4 Q. You have performed that in other cases, correct?

16:06:35 5 A. I have.

16:06:35 6 Q. But here you chose not to run a hypothetical
16:06:38 7 monopolist test on the narrower market, correct?

16:06:40 8 A. Correct.

16:06:40 9 Q. You didn't run a hypothetical monopolist test on the
16:06:43 10 broader markets either, right?

16:06:44 11 A. Correct.

16:06:45 12 Q. So there is no hypothetical monopolist test that you
16:06:48 13 run in your report in which either of the geographic markets
16:06:52 14 defined in the complaint actually fail the test, correct?

16:06:54 15 A. That's correct.

16:06:58 16 Q. Let's talk about your -- I think we have gone back
16:07:02 17 and forth on the language whether you call them plausible
16:07:06 18 markets or regions, which of those would you like to use
16:07:09 19 today?

16:07:09 20 A. I call them both, but I think regions is safe for
16:07:12 21 anything that's not being defined as a market, we call them
16:07:16 22 candidate markets if you prefer.

16:07:18 23 Q. You asked me to talk about them as regions in your
16:07:21 24 depositions, right, or in your deposition, correct?

16:07:23 25 A. Possibly. I don't remember.

Hill - cross

16:07:25 1 Q. The two regions that you talk about in your report
16:07:30 2 are the overlap, competitive overlap region and the national
16:07:35 3 region, right?

16:07:36 4 A. I also talk about Dr. Rothman's region, but yes, I
16:07:39 5 mention both.

16:07:39 6 Q. Those are the two alternative plausible markets that
16:07:42 7 you talk about in your report, correct?

16:07:44 8 A. Correct.

16:07:45 9 Q. And you didn't run a hypothetical monopolist test on
16:07:47 10 either of those, either, correct?

16:07:49 11 A. Correct.

16:07:50 12 Q. You're not aware of any reference in the horizontal
16:07:54 13 merger guidelines referring to a competitive overlap test,
16:07:57 14 correct?

16:07:57 15 A. Correct.

16:07:58 16 Q. Your competitive overlap region includes Michigan and
16:08:02 17 Ohio among other states, right?

16:08:05 18 A. That's correct.

16:08:05 19 Q. Your own backup data, Dr. Hill, shows that Michigan
16:08:09 20 Sugar has a 57 percent share within the State of Michigan;
16:08:13 21 is that right?

16:08:14 22 A. It could be. I don't know.

16:08:16 23 Q. Would it surprise you to learn that Michigan Sugar's
16:08:19 24 share is 57 percent within the State of Michigan?

16:08:22 25 A. No.

Hill - cross

16:08:22 1 Q. Your own backup data shows that Michigan Sugar has a
16:08:27 2 44 percent market share in Ohio, right?

16:08:30 3 A. It could well be.

16:08:31 4 Q. Would it surprise you to learn that Michigan Sugar
16:08:34 5 has a 44 percent share within the State of Ohio?

16:08:37 6 A. No.

16:08:38 7 Q. Would it surprise you to learn that your own backup
16:08:41 8 data, Michigan Sugar's share of sales was within Georgia at
16:08:46 9 one percent?

16:08:47 10 A. No.

16:08:48 11 Q. And at 0.1 percent in Florida?

16:08:52 12 A. No.

16:08:52 13 Q. And 0.1 percent in South Carolina?

16:08:56 14 A. No, I don't know those numbers, but I wouldn't be
16:08:59 15 surprised.

16:08:59 16 Q. But it won't surprise you?

16:09:01 17 A. Correct.

16:09:01 18 Q. You also discussed Texas during your direct
16:09:04 19 testimony, correct?

16:09:05 20 A. Correct.

16:09:06 21 Q. You told me at your deposition that you haven't
16:09:09 22 specifically analyzed whether Texas customers buying refined
16:09:12 23 sugar have the same competitive options as customers in
16:09:17 24 Georgia, right?

16:09:18 25 A. Correct.

Hill - cross

16:09:18 1 Q. And it's not necessarily true that customer in Texas
16:09:22 2 have the same competitive options as customers in Georgia,
16:09:25 3 correct?

16:09:26 4 A. Correct.

16:09:27 5 Q. Again, your own backup data shows that CSC has a
16:09:33 6 17 percent market share in Texas for 2021, would that
16:09:37 7 surprise you?

16:09:37 8 A. No, they have a facility in Texas.

16:09:40 9 Q. Would it surprise you if CSC has a 0.3 percent market
16:09:45 10 share in Georgia?

16:09:47 11 A. No.

16:09:50 12 Q. Your own backup data also shows that Western has an
16:09:53 13 eight percent market share in Texas for 2021 and a
16:09:57 14 0.9 percent share in Georgia, would that surprise you?

16:10:00 15 A. No, the shares by market, if you look at shares at a
16:10:04 16 state level they vary greatly, so I think we looked at
16:10:07 17 Dr. Rothman's Maryland, the parties have a combined share of
16:10:11 18 less than ten percent, and it's going to vary significantly
16:10:14 19 from state to state.

16:10:16 20 Q. LSR has approximately twice the market share in Texas
16:10:20 21 that it does in the narrower and broader markets, right?

16:10:22 22 A. I don't know that, but it wouldn't surprise me.

16:10:23 23 Q. Did you hear Mr. Cameron tell the Court in opening
16:10:31 24 statement that the defendants' position is that the market
16:10:32 25 is a national market?

Hill - cross

16:10:34 1

A. I did.

16:10:35 2

Q. But again, you're not actually taking the position on whether there is a national market, right?

16:10:37 3

16:10:40 4

A. Correct.

16:10:40 5

Q. And you heard Mr. Swart and Mr. Hanson testify that same day that United thinks about USDA regions when typically analyzing demand flows, did you hear that?

16:10:45 6

16:10:48 7

16:10:52 8

A. I did.

16:10:54 9

Q. You're aware, are you not, that the USDA south is based on the USDA census regions?

16:10:59 10

16:11:03 11

A. I thought it was based on census bureau regions.

16:11:06 12

Q. Census bureau regions.

16:11:08 13

You're also aware that the broader market that the United States has alleged in this case is based off of -- based on two out of three census regions in the USDA south, right?

16:11:10 14

16:11:14 15

16:11:18 16

16:11:18 17

A. Correct.

16:11:20 18

Q. And the west south central area that is not included in the government's alleged markets includes Texas that we just discussed, right?

16:11:24 19

16:11:28 20

16:11:28 21

A. Correct.

16:11:30 22

Q. Okay. And it also includes Louisiana, Arkansas and Oklahoma, correct?

16:11:35 23

16:11:38 24

A. Yes, there may be another state in there.

16:11:40 25

Q. Texas, Louisiana, Arkansas and Oklahoma?

Hill - cross

16:11:44 1 A. Okay.

16:11:45 2 Q. Mr. Snow, if we could pull up DDX, this is Dr. Hill's
16:11:51 3 slide that he just put up on slide 12, please.

16:12:00 4 There is only a very small portion of those
16:12:03 5 states that's covered by Imperial's secondary marketing
16:12:08 6 reasonable; correct?

16:12:09 7 A. So this is McKeany-Flavell's purported market.

16:12:14 8 Q. But you relied on this during your testimony just
16:12:18 9 now?

16:12:18 10 A. No. I presented this as a document that Dr. Rothman
16:12:21 11 relied upon.

16:12:22 12 Q. This was a document that was used in the ordinary
16:12:26 13 course, correct?

16:12:27 14 A. I don't know what was done with this document but I
16:12:30 15 would assume so.

16:12:31 16 Q. But in any event, whoever put it together the
16:12:34 17 secondary marketing region does not include those states
16:12:36 18 that we just talked about, right, Louisiana, Arkansas,
16:12:41 19 Oklahoma and Texas except for a very small part, correct?

16:12:42 20 A. That is correct.

16:12:50 21 Q. You did not cite any ordinary course documents in
16:12:52 22 your report showing that refiners set a single price
16:12:53 23 nationally, correct?

16:12:54 24 A. Correct.

16:12:55 25 Q. In fact, customers generally get locations specific

Hill - cross

16:13:01 1 prices, don't they?

16:13:03 2 A. My understanding of the General Mills testimony was
16:13:06 3 that it got one price, one FOB price for all its locations
16:13:11 4 and then it pays a transportation surcharge. I haven't --

16:13:16 5 Q. Let's take a look at your deposition. That might be
16:13:18 6 easier if you could open it up to page 159.

16:13:22 7 A. Sure.

16:13:39 8 Q. We're looking at lines 14 to 16. Just let me know
16:13:44 9 when you're there.

16:13:44 10 A. I'm there.

16:13:45 11 Q. "Question: In fact customers generally get location
16:13:48 12 specific price, don't they?

16:13:50 13 "Answer: That's correct."

16:13:51 14 That's what I asked you and that's what you
16:13:53 15 said?

16:13:53 16 A. That's correct.

16:13:54 17 Q. You haven't analyzed choices, Mr. Barbur talked about
16:13:57 18 this during your direct, you haven't analyzed choices made
16:14:01 19 by customers in southern California to determine whether
16:14:04 20 they routinely consider the same refiner options as
16:14:08 21 customers in and around Georgia, have you?

16:14:10 22 A. That's correct.

16:14:10 23 Q. In fact, you haven't reviewed any evidence relating
16:14:14 24 to which companies make bids to serve customers in southern
16:14:18 25 California, is that correct?

Hill - cross

16:14:20 1 A. That's correct.

16:14:20 2 Q. We briefly discussed Idaho during your deposition as
16:14:23 3 well, right?

16:14:25 4 A. We may well have. I'll take your word for it.

16:14:28 5 Q. You say you didn't know a lot about the competitive
16:14:29 6 situation in Idaho, correct?

16:14:32 7 A. Correct.

16:14:33 8 Q. Let's take a look at Figure 21 from your report,
16:14:37 9 Dr. Hill. Now, your chart in Figure 21 shows that Imperial
16:14:41 10 makes one to two percent of its sales in the Northeast,
16:14:51 11 Mountain, West Coast, Alaska and Hawaii regions combined,
16:14:58 12 correct?

16:14:59 13 A. Correct.

16:15:00 14 Q. But those would be included in your national region,
16:15:02 15 correct?

16:15:03 16 A. That's correct.

16:15:04 17 Q. Let's take a look at your Figure 23 of your report.

16:15:12 18 Now, you have your all U.S. region and your
16:15:16 19 competitive overlap region there, right?

16:15:17 20 A. That's correct.

16:15:18 21 Q. If you add United's and Imperial's market share in an
16:15:22 22 all U.S. market, you get 31 percent; correct?

16:15:26 23 A. Correct.

16:15:29 24 Q. 31 percent is higher than 30 percent, isn't it
16:15:32 25 Dr. Hill?

Hill - cross

16:15:33 1 A. Correct.

16:15:34 2 Q. And the combined share would be the largest in the

16:15:37 3 country, isn't that right?

16:15:39 4 A. Correct.

16:15:40 5 Q. Domino would have 25 percent in an all U.S. region?

16:15:45 6 A. That's correct.

16:15:45 7 Q. And the only other company with more than a ten

16:15:48 8 percent share would be NSM, correct?

16:15:50 9 A. Correct.

16:15:51 10 Q. And you haven't calculated NSM's share by region to

16:15:51 11 determine where most of NSM agency's sales occur, right?

16:15:51 12 A. Correct.

16:15:51 13 Q. And if you look at the competitive overlap region

16:16:02 14 there.

16:16:02 15 A. Yeah.

16:16:03 16 Q. And you add United and Imperial together, you get

16:16:04 17 37 percent; is that right?

16:16:04 18 A. Yes.

16:16:04 19 Q. Domino would have about 27 percent?

16:16:11 20 A. Correct.

16:16:12 21 Q. And no other refiner would have more than a nine

16:16:12 22 percent share; is that right?

16:16:12 23 A. Right, in both regions there are a number of other

16:16:12 24 refiners with significant shares.

16:16:22 25 Q. But none more than nine percent, right?

Hill - cross

- 16:16:25 1 A. Correct.
- 16:16:25 2 Q. Let's take a look at Figure 24. Your Figure 24 shows
- 16:16:33 3 market concentration based on the regions you proposed in
- 16:16:36 4 your report; correct?
- 16:16:38 5 A. That's correct.
- 16:16:39 6 Q. You used Dr. Rothman's share methodology when
- 16:16:43 7 calculating HHI in that one, correct?
- 16:16:46 8 A. Correct.
- 16:16:47 9 Q. For the all U.S. region, the increase in HHI would be
- 16:16:50 10 around 300 points both for 2020 and 2021, is that fair?
- 16:16:51 11 A. That's fair.
- 16:16:51 12 Q. For the competitive overlap region, the increase in
- 16:16:51 13 HHI would be somewhere between 400 and 600 points for both
- 16:17:04 14 2020 and 2021, right?
- 16:17:04 15 A. That's correct.
- 16:17:04 16 Q. And all those numbers are higher than 200, correct?
- 16:17:10 17 A. That's correct.
- 16:17:11 18 Q. We're going to switch gears here for a second. I'll
- 16:17:15 19 talk about United and US Sugar. Okay. United is the
- 16:17:19 20 exclusive marketing arm of its four member owners, correct?
- 16:17:23 21 A. That is correct.
- 16:17:24 22 Q. If a customer wants to purchase refined sugar that
- 16:17:27 23 has been refined by any of the United member owners, they
- 16:17:32 24 have to purchase through United, correct?
- 16:17:35 25 A. That's correct.

Hill - cross

16:17:36 1 Q. United doesn't provide multiple bids separately for
16:17:40 2 each member owner, does it?

16:17:41 3 A. Not to my knowledge.

16:17:42 4 Q. United sets a single bid on behalf of its member
16:17:46 5 owners for a particular RFP at a given point in time, right?

16:17:51 6 A. Correct.

16:17:51 7 Q. At the time of a bid, all member owners have the same
16:17:55 8 incentives on the price of that bid, don't they?

16:18:01 9 A. I think -- I'm a little confused by the question.

16:18:04 10 Q. Just to speed it up, let's take a look at your
16:18:09 11 deposition on page 23.

16:18:11 12 A. Okay. I'm there.

16:18:21 13 Q. We're going to look at lines 22 to 25. I asked you,
16:18:30 14 but at the time of a bid, all the member owners have the
16:18:33 15 same incentive on the price of that bid, right? Answer, I
16:18:36 16 think so. That was the question I asked you and that was
16:18:41 17 the answer you gave me, right?

16:18:41 18 A. Yeah. And again -- yeah.

16:18:44 19 Q. You used United sales and your market share
16:18:47 20 calculations, correct?

16:18:48 21 A. That's correct.

16:18:49 22 Q. You used United sales and transportation costs in
16:18:52 23 your economic models, right?

16:18:53 24 A. Correct.

16:18:54 25 Q. Let's take a look, Mr. Snow, if we could put up

Hill - cross

16:19:05 1 slides from Dr. Hill on, slide 3. You talked about this in
16:19:21 2 your direct examination, right?

16:19:22 3 A. Correct.

16:19:23 4 Q. Those numbers are made up, right?

16:19:25 5 A. These numbers are illustrative, yes.

16:19:28 6 Q. Let's take a look at the next slide, slide 4. Slide
16:19:36 7 4, the numbers for this slide here are based on the beet
16:19:43 8 freeze; correct?

16:19:44 9 A. Yeah, this is crop year 2019 which is not affected,
16:19:49 10 and the beet freeze of crop year 2020.

16:19:53 11 Q. So this was not the result of a strategic choice by
16:19:57 12 member owners, correct?

16:19:58 13 A. That's correct.

16:19:59 14 Q. Now, you haven't analyzed how divergent the United
16:20:09 15 member owner interests are in terms on how it would effect
16:20:13 16 the transaction, correct?

16:20:14 17 A. Correct.

16:20:16 18 Q. United chooses the price level on which it bids on
16:20:18 19 RFP, correct?

16:20:19 20 A. That's correct.

16:20:19 21 Q. And you analyzed the merger based on price effects,
16:20:22 22 correct?

16:20:23 23 A. Correct.

16:20:24 24 Q. You haven't analyzed the --

16:20:25 25 A. Sorry. I mean, my analysis is not just price

Hill - cross

16:20:32 1 effects, but I do for my model based on price.

16:20:34 2 Q. You haven't analyzed the creation or existence of
16:20:37 3 United or how it came to be, right?

16:20:39 4 A. That's correct.

16:20:40 5 Q. You're not an expert on firm composition, are you?

16:20:43 6 A. I am not.

16:20:45 7 Q. You understand that the USDA gives allocation to
16:20:49 8 refiners, correct?

16:20:52 9 A. I am not -- it gives allocation to -- the way I
16:20:54 10 understand it, to people to produce raw sugar, if they are
16:21:03 11 cane and if they are beet producers to produce refined
16:21:06 12 sugar.

16:21:07 13 Q. Okay. So there is a limit on how much the refiners
16:21:09 14 can increase output, is that fair?

16:21:13 15 A. Yes. Although I should just note that the USDA
16:21:16 16 sometimes raises those allocations. I believe Michigan
16:21:21 17 Sugar had a very good harvest this year or last year and
16:21:24 18 USDA raised its allocation.

16:21:28 19 Q. Sometimes they do that, correct?

16:21:30 20 A. Correct.

16:21:32 21 Q. Sometimes you just have your allocation?

16:21:34 22 A. I don't know if it's typical or not. There is an
16:21:37 23 allocation for both beet producers and raw cane.

16:21:39 24 Q. You're not aware, Dr. Hill, of any disagreement or
16:21:42 25 conflict between member owners related to output decisions,

Hill - cross

16:21:46 1

correct?

16:21:46 2

A. I believe Mr. Buker testified today that his plan to

16:21:49 3

increase output at Imperial was not popular with the other

16:21:53 4

members of the co-op.

16:21:55 5

Q. If there was a large difference in incentive, they

16:21:57 6

might not have an incentive to stay in the cooperative at

16:22:01 7

all, right?

16:22:02 8

A. Conceivably.

16:22:04 9

Q. Let's switch gears here and let's talk about

16:22:07 10

competition between United and Imperial. Okay?

16:22:09 11

A. Okay.

16:22:10 12

Q. You don't dispute that United and Imperial compete,

16:22:13 13

do you?

16:22:13 14

A. No.

16:22:14 15

Q. Let's take a look at your Figure 26. And Figure 26,

16:22:21 16

the columns there include four competitors, right? Do you

16:22:24 17

see that?

16:22:27 18

A. Correct.

16:22:28 19

Q. And this chart was meant to respond to a chart that

16:22:32 20

Dr. Rothman had which only included Imperial and United,

16:22:38 21

right?

16:22:38 22

A. Well, this chart I think is showing that I don't

16:22:42 23

think the methodology used here is reliable.

16:22:44 24

Q. Now, the competitors you chose there were Cargill,

16:22:45 25

Domino, Imperial and United, right?

Hill - cross

16:22:51 1 A. Correct.

16:22:52 2 Q. And your report doesn't specify why you chose those
16:22:55 3 four competitors, does it?

16:22:56 4 A. No.

16:22:57 5 Q. You told me in deposition that you didn't remember
16:22:59 6 why you picked those four, do you recall that?

16:23:02 7 A. I do.

16:23:02 8 Q. You chose those four because they illustrate your
16:23:05 9 point the best, isn't that right, Dr. Hill?

16:23:07 10 A. I did not.

16:23:08 11 Q. These are the four companies that have the most
16:23:11 12 overlap with each other in the narrower and broader markets,
16:23:14 13 don't they?

16:23:15 14 A. I don't know that. I don't know that.

16:23:17 15 Q. You didn't include NSM or Michigan or Western in this
16:23:21 16 chart, did you?

16:23:21 17 A. No.

16:23:21 18 Q. There are no distributors on this chart, right?

16:23:25 19 A. Correct.

16:23:26 20 Q. The chart shows that Imperial's large market, the
16:23:30 21 chart shows that Imperial large customers in the broader
16:23:32 22 market, United overlaps on 56 percent of those customers,
16:23:33 23 correct?

16:23:34 24 A. Strictly speaking I think this is the top 50
16:23:42 25 customers to be specific, but yes.

Hill - cross

16:23:44 1 Q. They overlap on 56 percent of those customers,
16:23:46 2 correct?

16:23:47 3 A. Again, here overlap just means that they also have
16:23:50 4 sales in that location or that -- I think --

16:23:53 5 Q. For that customer, correct?

16:23:54 6 A. Correct. But it could be one sale. This is part of
16:23:59 7 the reason I don't think this is a reliable methodology,
16:24:01 8 it's just not clear what this is producing.

16:24:04 9 Q. In any event, 56 percent is more than half, right?

16:24:07 10 A. That's true.

16:24:08 11 Q. And it also shows that Imperial overlaps on
16:24:11 12 77 percent of United's customers in the broader market,
16:24:14 13 right?

16:24:15 14 A. Correct.

16:24:16 15 Q. And in the narrower market Imperial overlaps with
16:24:20 16 38 percent of United's large customers, right?

16:24:23 17 A. That's correct. And the smallest of the listed
16:24:26 18 producers.

16:24:27 19 Q. And of the customers served by Imperial United
16:24:30 20 overlaps 54 percent, right?

16:24:32 21 A. Again, the lowest of all, yes.

16:24:32 22 Q. And it's not your view, is it, Dr. Hill, that
16:24:37 23 competitors in a market must always be each other's closest
16:24:41 24 competitor for there to be harm from that merger, right?

16:24:42 25 A. Yes, I agree.

Hill - cross

16:24:45 1 Q. Let's talk about distributors. Distributors buy
16:24:49 2 sugar from refiners, correct?

16:24:51 3 A. Some distributors buy sugar from refiners. Some
16:24:55 4 distributors refine their own sugar. Some distributors melt
16:24:59 5 sugar.

16:24:59 6 Q. Refiners collectively control the critical input of
16:25:04 7 refined sugar for distributors, correct?

16:25:06 8 A. For all refiners, including importers, correct.
16:25:10 9 Well, again, the distributors who independently refine their
16:25:13 10 own sugar, no.

16:25:14 11 Q. Okay. You believe it's important for distributors to
16:25:18 12 have independent sources of supply, don't you?

16:25:20 13 A. I do.

16:25:21 14 Q. Let's take a quick look at a slide you presented
16:25:24 15 earlier today about distributors. Those big gray boxes up
16:25:28 16 there, those are imports, right?

16:25:31 17 A. That is correct.

16:25:32 18 Q. You are aware that Dr. Rothman includes imports in
16:25:35 19 his market share; right?

16:25:37 20 A. Correct.

16:25:38 21 Q. And in both charts the red and green volumes combined
16:25:42 22 would be the volume of a merged United and Imperial firm,
16:25:45 23 correct?

16:25:47 24 A. Correct.

16:25:49 25 Q. So that leaves somewhere in the ballpark in terms of

Hill - cross

16:25:52 1 percentages about 10, 15, 20 percent, something like that,
16:25:57 2 you can do the math based on the remaining bars, is that
16:26:00 3 fair?

16:26:00 4 A. But I don't think -- you're thinking about how this
16:26:03 5 is going to affect market share calculations, it's misguided
16:26:07 6 because you have to deduct sales to distributors from the
16:26:09 7 share of the competitors in the market and then you have to
16:26:11 8 independently assign them to distributors.

16:26:14 9 Q. You can explain all that on redirect. I'm just
16:26:17 10 asking about the numbers.

16:26:18 11 A. I don't -- let me see, do a quick calculation. I
16:26:24 12 would estimate it's on the order -- in the left-hand graph
16:26:28 13 it's probably on the order of about 20 percent, or maybe 15
16:26:32 14 to 20.

16:26:33 15 Q. That's what I asked you, right? That was a yes?

16:26:38 16 A. Yes.

16:26:39 17 Q. Distributors typically add a markup when they sell
16:26:42 18 refined sugar, right?

16:26:43 19 A. Correct.

16:26:44 20 Q. A refiner may choose not to sell to a distributors
16:26:48 21 unless they have some kind of contract that requires them
16:26:51 22 to, correct?

16:26:52 23 A. Correct.

16:26:52 24 Q. Refiners could try to distribute their own sugar
16:26:55 25 directly and not sell to distributors, correct?

Hill - cross

16:26:58 1 A. That's correct.

16:26:58 2 Q. United has done that for certain customers in
16:27:02 3 Chicago, correct?

16:27:05 4 A. That was my understanding, yes.

16:27:05 5 Q. You told me at your deposition that distributors are
16:27:09 6 good for reaching certain customers, correct?

16:27:10 7 A. Yes.

16:27:11 8 Q. Sometimes distributors are selling to customers that
16:27:14 9 refiners can't sell to or decide not to sell to, right?

16:27:18 10 A. They may be. I don't have direct evidence of that.

16:27:21 11 Q. Refiners refer customers to distributors at times for
16:27:25 12 smaller orders of sugar; is that right?

16:27:27 13 A. They may.

16:27:29 14 Q. Refiners sometimes refer to distributors as partners,
16:27:33 15 is that right?

16:27:34 16 A. Yes, so the distributors do play, many distributors
16:27:38 17 play a dual role.

16:27:40 18 Q. Just asking whether they refer to them as partners
16:27:42 19 sometimes. Is that a yes or no?

16:27:45 20 THE COURT: Just so we're clear, I usually let
16:27:47 21 witnesses answer yes, you must answer yes or no if you can
16:27:50 22 first, but they get a brief explanation.

16:27:52 23 MR. STRONG: That's fine, Your Honor.

16:27:54 24 THE COURT: Because I don't like having a record
16:27:56 25 where he doesn't believe it but he's not allowed to explain.

Hill - cross

16:28:00 1 That goes for all witnesses.

16:28:02 2 MR. STRONG: That's fair. Thank you, Your
16:28:03 3 Honor.

16:28:04 4 BY MR. STRONG:

16:28:05 5 Q. Refiners at times may benefit from sales by
16:28:08 6 distributors, right?

16:28:09 7 A. Correct.

16:28:10 8 Q. In your view where a distributor is a distribution
16:28:15 9 arm, those sales should count towards a refiners market
16:28:19 10 share, right?

16:28:20 11 A. Agreed.

16:28:21 12 Q. You don't calculate market shares for distributors in
16:28:24 13 your report; is that right?

16:28:25 14 A. That's correct.

16:28:26 15 Q. You don't include distributors in your market share
16:28:29 16 calculations at all, right?

16:28:30 17 A. That's correct.

16:28:31 18 Q. You also don't include distributors' sales in your
16:28:34 19 economic model, correct?

16:28:35 20 A. That's also correct.

16:28:36 21 Q. You talked about the Dean Foods case?

16:28:40 22 A. Correct.

16:28:41 23 Q. Now, that was a case about milk?

16:28:44 24 A. Fluid and school milk, yes.

16:28:45 25 Q. Some of that milk was sold by producers to

Hill - cross

16:28:53 1 distributors, correct?

16:28:53 2 A. Correct.

16:28:54 3 Q. And the distributors in that case did not get market
16:28:57 4 share, correct?

16:28:57 5 A. That's correct.

16:28:59 6 Q. Let's talk about your economic models. You discussed
16:29:06 7 two economic models that you used to estimate harm of the
16:29:10 8 merger during your direct testimony; right?

16:29:12 9 A. That's correct.

16:29:13 10 Q. One is a bidding model?

16:29:14 11 A. Correct.

16:29:14 12 Q. And the other is a second price auction, correct?

16:29:14 13 A. That's correct. So I'm sorry, the second, relative
16:29:23 14 cost model.

16:29:24 15 Q. The relative cost model?

16:29:24 16 A. I mean a second score auction type format.

16:29:31 17 Q. Thank you, Dr. Hill.

16:29:34 18 In a second price auction, the model assumes
16:29:34 19 that a customer chooses the suppliers that submits the
16:29:34 20 lowest bid but pays a price equal to the second lowest bid
16:29:42 21 submitted, correct?

16:29:42 22 A. You're asking me in my models?

16:29:42 23 Q. In your models, yes?

16:29:42 24 A. No, in the bidding model it starts with United
16:29:52 25 customers and then looks at -- United customers for whom

Hill - cross

16:29:56 1 Imperial is the lowest cost alternative and the same for
16:30:00 2 Imperial. And then in the relative cost model, again, it
16:30:03 3 starts with who is the supplier and then estimates the
16:30:06 4 relationship between the price paid by that customer, the
16:30:12 5 distance to their current supplier and their distance to
16:30:16 6 alternatives.

16:30:17 7 Q. Now, you assume for purposes of the model that the
16:30:21 8 production and manufacturing costs of the refiners is the
16:30:25 9 same across all refiners, correct?

16:30:28 10 A. Correct. Well -- yeah, correct enough.

16:30:31 11 Q. And the only cost difference between refiners in your
16:30:37 12 bidding model is their transportation cost to customers,
16:30:41 13 right?

16:30:41 14 A. To put it slightly differently, I'm just assuming
16:30:44 15 that on average those differences are not significant and
16:30:47 16 I'm focusing on transportation costs.

16:30:51 17 Q. Let's take a look at what you said in your
16:30:53 18 deposition. Open it up to page 196. Let me know when
16:31:05 19 you're there.

16:31:05 20 A. I'm there.

16:31:08 21 Q. We're taking a look at lines 21 to 25.

16:31:11 22 "QUESTION: So the only cost difference between
16:31:13 23 the refiners in your model is their transportation cost to
16:31:16 24 the customers?

16:31:17 25 "ANSWER: Correct."

Hill - cross

16:31:18 1 Is that the question that I asked you and the
16:31:20 2 answer that you gave me?

16:31:21 3 A. It is.

16:31:22 4 Q. You used Dr. Rothman's methodology for calculating
16:31:26 5 freight, right?

16:31:27 6 A. Correct, we -- I think we actually made some minor
16:31:31 7 differences but we basically mirrored each other.

16:31:34 8 Q. And the bidding model, you present each supplier's
16:31:37 9 bid, its total cost of supply, right?

16:31:43 10 A. The bidding model, do you mean the relative cost
16:31:51 11 model or the bidding model?

16:31:53 12 Q. We can move on. Why don't we talk about the relevant
16:31:56 13 cost model for a minute. In the relevant cost model, you
16:32:01 14 ran a regression, right?

16:32:02 15 A. Yes.

16:32:03 16 Q. You determined that transportation cost do in fact
16:32:06 17 influence the price paid by customers, right?

16:32:08 18 A. That's right.

16:32:09 19 Q. In both of your models, transportation cost play
16:32:13 20 crucial role in competition, correct?

16:32:14 21 A. Yes.

16:32:17 22 Q. In your view, though, there are factors beyond
16:32:20 23 transportation costs that could affect whether a supplier
16:32:25 24 wins the business?

16:32:26 25 A. That's correct.

Hill - cross

16:32:26 1 Q. Reliability is something that a customer could
16:32:29 2 consider?

16:32:29 3 A. Correct.

16:32:30 4 Q. Quality of the product is something that a customer
16:32:32 5 could consider?

16:32:33 6 A. Correct.

16:32:34 7 Q. Customer service is something a customer could
16:32:39 8 consider?

16:32:39 9 A. Correct.

16:32:39 10 Q. Customers could have particular specifications for
16:32:41 11 their sugar, right?

16:32:41 12 A. That's correct.

16:32:41 13 Q. Just a few more. Delivery time is something a
16:32:50 14 customer could consider?

16:32:51 15 A. Correct.

16:32:51 16 Q. A refiner's sold position could play a role in what
16:32:58 17 price the refiner submits, right?

16:33:01 18 A. Correct. A refiner with a very -- an oversold
16:33:07 19 position, my estimate a different bid than a refiner with a
16:33:10 20 lot of sugar to move, yes.

16:33:12 21 Q. Competing sales opportunities can influence what
16:33:15 22 price the refiner submits, right?

16:33:18 23 A. They could.

16:33:20 24 Q. Credit terms and payment options are something that a
16:33:24 25 customer might think about when choosing a supplier, right?

Hill - cross

16:33:27 1 A. Agreed.

16:33:27 2 Q. Last one, packaging options also may affect a
16:33:31 3 customer's willingness to purchase from a supplier?

16:33:34 4 A. Correct.

16:33:35 5 Q. If we could take a look at your report at
16:33:38 6 paragraph 377. That paragraph says that "to simulate the
16:33:44 7 change in price post merger, I recalculate each of the
16:33:51 8 relative freight costs as if United and Imperial are one
16:33:55 9 firm."

16:33:56 10 That's accurate, right?

16:33:57 11 A. That's correct.

16:33:58 12 Q. The next sentence says that the coefficient estimates
16:34:04 13 on each of these variables. By these variables you mean the
16:34:08 14 relative freight cost, right? That's what it says in the
16:34:12 15 previous sentence?

16:34:12 16 A. Right.

16:34:13 17 Q. So the sentence says that the coefficient
16:34:17 18 estimates on each of these variables dictate how these
16:34:21 19 changes in cost correspond to a change in price? That's
16:34:22 20 what you wrote, correct?

16:34:22 21 A. Right.

16:34:22 22 Q. And your bidding model assumes different suppliers
16:34:30 23 differentiate from each other solely based on transportation
16:34:34 24 costs, right?

16:34:34 25 A. I wouldn't say that's quite right because in the

Hill - cross

16:34:37 1 model I start with United's suppliers and I look -- but the
16:34:41 2 distance between the current Imperial and United when
16:34:44 3 they're the closest alternative today and the next closest
16:34:47 4 alternative is solely based on transportation cost.

16:34:50 5 Q. And the effects that you calculate in the bidding
16:34:53 6 model is driven by the distance from Imperial or United and
16:34:56 7 the next lowest cost supplier, right?

16:34:59 8 A. It's the distance between -- the transportation cost
16:35:04 9 difference between the current closest constraint which is
16:35:08 10 either Imperial or United and the second.

16:35:09 11 Q. US Sugar's Clewiston facility is about thirty miles
16:35:14 12 from ASR's South Bay facility, is that correct?

16:35:17 13 A. That's right.

16:35:19 14 Q. You have seen evidence in this case that the
16:35:21 15 difference in bid submission between ASR and United are
16:35:25 16 orders of magnitude greater than what would be implied by
16:35:28 17 the difference in transportation cost between those two
16:35:31 18 suppliers, right?

16:35:31 19 A. I'm not aware of that evidence. I'm not saying it
16:35:34 20 doesn't exist.

16:35:35 21 Q. You heard the testimony of Mr. Riippa in this case?

16:35:37 22 A. I did.

16:35:37 23 Q. In the numbers from that testimony are confidential,
16:35:40 24 but you have been made aware of them, right?

16:35:42 25 A. I didn't -- I was watching remotely so I didn't

Hill - cross

16:35:46 1 actually see the numbers.

16:35:47 2 Q. You heard the testimony of Mr. Cagle in this case?

16:35:49 3 A. I did not.

16:35:51 4 Q. Let's talk about efficiency real quick. You
16:35:54 5 mentioned that on your direct. Okay?

16:36:10 6 You haven't done any evaluation of how much more
16:36:13 7 secure the supply of sugar would be at Port Wentworth with
16:36:16 8 the merger compared with what Port Wentworth is doing today,
16:36:22 9 correct?

16:36:23 10 A. Aside from US Sugar's estimate of how much raw sugar
16:36:29 11 it -- that's correct.

16:36:30 12 Q. If SCGC were to send additional sugar to Port
16:36:36 13 Wentworth, that particular sugar would not be available for
16:36:39 14 other purchasers, correct?

16:36:41 15 A. Correct.

16:36:41 16 Q. And you haven't done any analysis to determine
16:36:44 17 whether whoever loses access to that sugar supply would be
16:36:48 18 less able to constrain a merger of United and Imperial,
16:36:51 19 correct?

16:36:52 20 A. Correct.

16:36:54 21 Q. You also have not done an independent evaluation of
16:36:57 22 the opportunity costs for US Sugar or SCGC of selling sugar
16:37:00 23 to Port Wentworth as compared to selling it to whoever is
16:37:02 24 purchasing it today, correct?

16:37:04 25 A. Can you repeat that question, please?

Hill - cross

16:37:11 1 Q. You also have not done an independent evaluation of
16:37:15 2 the opportunity costs for US Sugar of SCGC of selling sugar
16:37:21 3 to Port Wentworth as compared to selling to whoever is
16:37:25 4 purchasing that sugar today, right?

16:37:27 5 A. Correct.

16:37:28 6 Q. You have not in your report or today concluded that
16:37:32 7 the overall amount of sugar will increase in any market as a
16:37:36 8 result of this merger, correct?

16:37:39 9 A. I would say -- I think my report says that I expect
16:37:44 10 production to increase at Port Wentworth.

16:37:47 11 Q. At Port Wentworth. Okay. But overall --

16:37:51 12 A. But I didn't do an overall, yeah.

16:37:55 13 Q. Okay. Let me just -- you discuss in your report that
16:37:59 14 US Sugar estimates that it will increase output at Port
16:38:03 15 Wentworth from 15 million hundredweight in 2021 to 17
16:38:10 16 million hundredweight in 2025, correct?

16:38:12 17 A. Correct.

16:38:13 18 Q. You cite a financial model 4D 12 in your report for
16:38:18 19 support for that, correct?

16:38:19 20 A. Correct. And Mr. Buker actually testified on it
16:38:23 21 today.

16:38:24 22 Q. In that spreadsheet, the production is assumed to be
16:38:29 23 equal to sales quantity, isn't that right?

16:38:31 24 A. I believe so.

16:38:33 25 Q. There is a conservative scenario in that spreadsheet,

Hill - cross

16:38:37 1 isn't there?

16:38:37 2 A. There is.

16:38:38 3 Q. And the conservative scenario in the spreadsheet
16:38:43 4 cited there are actually no increases from 2021 to 2025,
16:38:47 5 correct?

16:38:48 6 A. That's correct.

16:38:48 7 Q. You haven't done any independent evaluation to
16:38:52 8 determine whether the sales from Port Wentworth will be
16:38:56 9 equivalent to the numbers in that spreadsheet, fair?

16:38:59 10 A. Fair.

16:38:59 11 Q. You also haven't done an independent evaluation of
16:39:03 12 how much Imperial could increase its output on its own
16:39:07 13 compared to the projections in the spreadsheet, correct?

16:39:09 14 A. I disagree with that a little. I think I said in my
16:39:13 15 deposition and also my report, Imperial to date has not
16:39:17 16 undertaken these increases, so United has been able to
16:39:21 17 increase its output at Clewiston, Imperial has not increased
16:39:25 18 output at Port Wentworth commensurate.

16:39:29 19 Q. Let's take a look at what you said in your
16:39:33 20 deposition. Okay?

16:39:33 21 A. Sure.

16:39:34 22 Q. Open it up to page 320 there.

16:39:34 23 A. I'm there.

16:39:40 24 Q. "QUESTION: Have you done any independent evaluation
16:39:42 25 of how much Imperial could increase its output on its own

Hill - cross

16:39:50 1 compared to the projections in this spreadsheet?

16:39:53 2 "ANSWER: No, I have not. Other than, you know,
16:39:55 3 the statements from Louis Dreyfus that it doesn't intend to
16:39:59 4 invest in this facility, I should say invest material
16:40:03 5 improvements."

16:40:03 6 That was the question I asked and that was the
16:40:05 7 answer you gave, correct?

16:40:06 8 A. I think this is a little misleading because we had a
16:40:08 9 discussion about this and I made the point I made earlier
16:40:11 10 and here I'm referencing back to that same Louis Dreyfus
16:40:14 11 statement, it doesn't intend to invest in material
16:40:17 12 improvements.

16:40:17 13 Q. You also haven't done an independent evaluation of
16:40:21 14 Louis Dreyfus' incentives to invest in Port Wentworth,
16:40:27 15 correct?

16:40:27 16 A. Well, again, I think I said in my -- yes, I haven't
16:40:31 17 done an independent evaluation, but I do discuss in my
16:40:34 18 report they have stated that they are not intending to
16:40:38 19 invest in material improvements.

16:40:39 20 Q. They are trying to sell the asset, right?

16:40:42 21 A. That's correct.

16:40:43 22 Q. You didn't incorporate any efficiencies in projected
16:40:48 23 increases and in outputs in your model?

16:40:51 24 A. Yes.

16:40:52 25 Q. Let's talk about transportation costs.

Hill - cross

16:40:55 1 MR. STRONG: I have a couple more topics, Your
16:40:58 2 Honor.

16:40:58 3 THE COURT: Couple more topics?

16:40:59 4 MR. STRONG: Yeah, it will be quick.

16:40:59 5 THE COURT: You're over twelve hours already.

16:41:03 6 MR. STRONG: I got ten minutes before Mr. Hanna
16:41:07 7 pulls me down.

16:41:08 8 THE COURT: You have got to save some time for
16:41:09 9 closing.

16:41:09 10 BY MR. STRONG:

16:41:10 11 Q. You accepted \$12 million of transportation cost in
16:41:13 12 your model?

16:41:14 13 A. That's correct.

16:41:14 14 Q. You also cited that same spreadsheet we were just
16:41:17 15 talking about for those figures?

16:41:19 16 A. That's correct.

16:41:19 17 Q. That spreadsheet actually tops out at 10 million?

16:41:23 18 A. That's correct.

16:41:23 19 Q. And you understand that that amount was modeled to be
16:41:27 20 returned to United member owners, correct?

16:41:29 21 A. I don't think that's quite right. I think they say
16:41:32 22 that that's the change in the net selling price and then
16:41:34 23 they're silent on what exactly is going to happen to it and
16:41:37 24 whether there will be any other decrease in price.

16:41:41 25 Q. Do you remember a note from that spreadsheet that

Hill - cross

16:41:45 1 says amount to be returned to members?

16:41:46 2 A. I don't.

16:41:47 3 Q. If we can just quickly take a look at your
16:41:50 4 deposition, maybe that will help refresh your recollection.

16:41:54 5 A. Okay. Where would you like me to go?

16:41:56 6 Q. I'm sorry, page 327. You're going to be at lines 2
16:42:03 7 through 6:

16:42:04 8 "QUESTION: The language also says amount to be
16:42:06 9 returned to members, not included in NSP above. Do you see
16:42:11 10 that?

16:42:11 11 "ANSWER: I do.

16:42:12 12 "QUESTION: Is it your understanding that the
16:42:14 13 word 'members' means the member owners of United?

16:42:18 14 "ANSWER: Yes, I would think so."

16:42:21 15 Those are the questions I asked you and that was
16:42:23 16 the answer you gave, correct?

16:42:24 17 A. Right. And then below it I say exactly what I just
16:42:27 18 said, I think the net selling price is the price minus cost.

16:42:31 19 Q. In any event, you incorporated those synergies into
16:42:32 20 your model?

16:42:38 21 A. Correct.

16:42:38 22 Q. And the transportation costs were calculated --

16:42:42 23 A. I'm sorry, they are in the bidding model, but they
16:42:45 24 are not in relative cost model.

16:42:48 25 Q. The transportation cost synergies were calculated at

Hill - cross

16:42:52 1 the United level, not the US Sugar level, correct?

16:42:55 2 A. Correct.

16:42:56 3 Q. It's not your understanding that the merging parties
16:43:00 4 contemplated that the cost of shipping from the same
16:43:03 5 location to the same customer would go down post merger,
16:43:07 6 correct?

16:43:08 7 A. That I think is correct.

16:43:10 8 Q. But the cost of shipping from the same location is
16:43:14 9 lower in the model right?

16:43:16 10 A. Yeah, that's correct.

16:43:19 11 Q. In any event, efficiencies even in your model make a
16:43:24 12 very small difference, correct?

16:43:27 13 A. Yes, they make a negligible price increase, very
16:43:32 14 slightly more negligible.

16:43:34 15 MR. STRONG: Two more topics, Your Honor.

16:43:36 16 Q. You discussed entry and expansion with Mr. Barbur
16:43:39 17 earlier. Do you recall that?

16:43:41 18 A. I do.

16:43:43 19 Q. You discussed -- hold on one second.

16:43:46 20 I'll just skip to the end on this one.

16:43:48 21 You haven't done any analysis in your report to
16:43:52 22 determine how much prices would need to rise to incentivize
16:43:55 23 entry, correct?

16:43:57 24 A. That's correct.

16:44:00 25 Q. Let's talk about the USDA real quick and then we'll

Hill - cross

16:44:04 1 be done.

16:44:05 2 Dr. Hill, you don't disagree that it has been
16:44:08 3 the USDA's goal since 1981 to adjust imports so that the
16:44:13 4 domestic prices remain above minimum support level, right?

16:44:19 5 A. Certainly it's a goal of the USDA to keep prices
16:44:23 6 above the minimum support levels.

16:44:24 7 Q. The USDA strives to maintain a stock-to-use ratio
16:44:29 8 between 13.5 and 15.5 percent?

16:44:33 9 A. That's correct.

16:44:33 10 Q. And although the USDA maintains a stock-to-use ratio,
16:44:37 11 there is still competition that occurs between refiners
16:44:40 12 today, correct?

16:44:41 13 A. That's correct.

16:44:42 14 Q. The market price for refined sugar changes, right?

16:44:44 15 A. Correct.

16:44:45 16 Q. It's not your view that the USDA allows additional
16:44:51 17 imports every time prices rise to a particular customer,
16:44:54 18 right?

16:44:54 19 A. Correct.

16:44:55 20 Q. Or in a particular region, correct?

16:44:57 21 A. Correct.

16:45:00 22 Q. It's your understanding that the Harmonized Tariff
16:45:02 23 schedule that was discussed with Dr. Fecso earlier was
16:45:10 24 discretionary, correct?

16:45:12 25 A. That's what she testified to, yes.

Hill - cross

16:45:16 1 Q. You can't make any prediction that the USDA would
16:45:20 2 take action or would not take action if prices increased in
16:45:23 3 a given region, correct?

16:45:26 4 A. Correct. My prediction was about the possibility
16:45:28 5 that it might happen.

16:45:31 6 Q. And you don't purport to be an expert on the USDA,
16:45:35 7 correct?

16:45:35 8 A. That is correct.

16:45:38 9 Q. You have no reason to believe that the USDA will
16:45:41 10 change its view on the appropriate stock-to-use ratio if the
16:45:45 11 merger is not approved, right?

16:45:47 12 A. If the merger is approved or not approved?

16:45:51 13 Q. If the merger is not approved.

16:45:53 14 A. No, I think no.

16:45:54 15 Q. And you have no reason to believe that the USDA will
16:45:57 16 change its view on the appropriate stock-to-use ratio if the
16:46:01 17 merger is approved?

16:46:03 18 A. Correct.

16:46:04 19 Q. And you haven't analyzed whether the USDA has
16:46:12 20 increased imports based on the price of refined sugar in the
16:46:15 21 United States while the stocks-to-use ratio remained between
16:46:18 22 13.5 to 15.5 percent, correct?

16:46:21 23 A. Correct.

16:46:22 24 Q. Last question.

16:46:23 25 Nowhere in your report do you express the

16:46:25 1 opinion that the USDA will in fact allow additional imports
16:46:30 2 if prices to customers rise as a result of this merger,
16:46:33 3 correct?

16:46:34 4 A. Correct.

16:46:35 5 MR. STRONG: That's all. Thank you, Your Honor.

16:46:38 6 THE COURT: Thank you. Redirect.

16:46:42 7 MR. BARBUR: No redirect, Your Honor.

16:46:43 8 THE COURT: Thank you. You are excused.

16:46:47 9 What's next?

16:46:49 10 THE WITNESS: Thank you, Your Honor.

16:46:54 11 MS. DWYER: Your Honor, at this time the
16:46:57 12 defendants would like to play three video depositions of
16:47:00 13 third parties all of whom have requested to seal the
16:47:03 14 courtroom, so Post Foods, CSC and Indiana Sugars.

16:47:10 15 THE COURT: How much time is this going to take.

16:47:13 16 MS. DWYER: The three videos altogether are an
16:47:15 17 hour and eighteen minutes. Individually they're
16:47:18 18 twenty-six minutes, thirty-one minutes and nineteen minutes
16:47:20 19 respectively.

16:47:23 20 THE COURT: That's going to take us past
16:47:25 21 6 o'clock, so pick two.

16:47:27 22 MS. DWYER: We'll do the first two, Thomas Crown
16:47:30 23 and Paul Farmer.

16:47:32 24 THE COURT: What's coming after this?

16:47:40 25 MR. BUTERMAN: So Your Honor, we have I believe

16:47:44 1 four or five videos total that we have to play. And I
16:47:48 2 apologize for that. We're trying to work out that issue for
16:47:53 3 tomorrow morning with the witness, otherwise unfortunately
16:47:58 4 that's a video. And I think the one live witness and then
16:48:01 5 we close.

16:48:03 6 THE COURT: All right. You guys are running out
16:48:05 7 of time, too.

16:48:06 8 MR. BUTERMAN: We have calculated our time, Your
16:48:07 9 Honor, and we will be leaving an hour for closings as well.

16:48:13 10 THE COURT: All right. I assume most of this
16:48:16 11 hour-and-a-half is yours. Because the government doesn't
16:48:21 12 have an hour-and-a-half.

16:48:23 13 MR. BUTERMAN: I just looked at some of the
16:48:24 14 videos. I think that -- the government doesn't go over
16:48:28 15 their allotment on these, so they are more of ours. I have
16:48:31 16 the run times here. So for the first gentleman, Mr. Crown,
16:48:41 17 it is we're going to do for Mr. Crown 21 minutes and
16:48:51 18 57 seconds to defendants, the government is 4 minutes and
16:49:04 19 13 seconds.

16:49:05 20 For the second one, Mr. Farmer, defendants are
16:49:12 21 20 minutes and the government is 11 minutes.

16:49:14 22 THE COURT: Okay.

16:49:19 23 (Videotape deposition of Thomas Crown:)

16:49:22 24 Q. Mr. Crown, who do you currently work for?

16:49:25 25 A. Post Holdings, Inc.

16:49:30 1 Q. And what's your job title?

16:49:32 2 A. I am director, ingredient procurement.

16:49:40 3 Q. And how long have you worked at Post Holdings?

16:49:42 4 A. Ten years.

16:49:44 5 Q. And you mentioned that Post consumer brands makes

16:49:49 6 cereal. What are Post's most popular lines?

16:49:52 7 A. Honey Bunches of Oats; Post Raisin Bran; Grapenuts;

16:50:01 8 Pebbles, Cocoa Pebbles, Fruity Pebbles; Honeycombs; Great

16:50:10 9 Grains. I'm sure there's others.

16:50:21 10 Q. Who do you consider to be Post's main competitors?

16:50:25 11 A. General Mills and Kellogg's.

16:50:27 12 Q. And how many manufacturing plants does Post have that

16:50:31 13 make cereal?

16:50:40 14 A. Post has five U.S.-based manufacturing plants.

16:50:44 15 Q. And is one of those manufacturing plants in Asheboro,

16:50:48 16 North Carolina?

16:50:51 17 A. Yes, it is.

16:50:57 18 Q. And how many of Post's plants use sugar?

16:51:01 19 A. All of them.

16:51:04 20 Q. And do you oversee the sugar procurement for all of

16:51:08 21 them?

16:51:10 22 A. Yes, I do.

16:51:12 23 Q. And in terms of volume, do you know how much Post --

16:51:18 24 do you know how much sugar Post uses each year across all of

16:51:24 25 its plants?

16:51:26 1 A. Yes, I do.

16:51:28 2 Q. And how much is that?

16:51:29 3 A. [REDACTED]

16:51:34 4 Q. And how much refined sugar is Asheboro buying in a
16:51:41 5 given year?

16:51:42 6 A. I will buy [REDACTED] of sugar into that
16:51:47 7 facility.

16:51:49 8 Q. And refined sugar can be made from both sugarcane and
16:51:55 9 sugar beet; is that right?

16:52:02 10 A. Yeah, sugar comes from two sources, cane sugar and
16:52:07 11 sugar beets.

16:52:08 12 Q. And which of these sources will Asheboro take?

16:52:12 13 A. They have the flexibility of using either one. And
16:52:17 14 we are indifferent to which one would be shipped in there.

16:52:24 15 Q. And how many different suppliers of sugar does Post
16:52:28 16 buy from -- you know, across all of its plants?

16:52:32 17 A. I'm going to say probably half a dozen.

16:52:38 18 Q. Can you name them?

16:52:42 19 A. There's going to be -- we buy from United Sugar,
16:52:48 20 which is the marketing arm for US Sugar, and several other
16:52:52 21 beet co-ops. We buy from National Sugar Marketing, which is
16:53:00 22 the marketing entity for a couple of beet co-ops. We buy
16:53:10 23 from Michigan Sugar. We also buy from Cargill, who does the
16:53:17 24 marketing for Louisiana Sugar Refining. We do some business
16:53:22 25 with Imperial. And we do some business with Domino. And we

16:53:33 1 also do business with a company called CSC.

16:53:39 2 Q. Any others that come to mind?

16:53:43 3 A. And we're also doing business with a company called
16:53:47 4 Sucro Can.

16:53:50 5 Q. Anybody else?

16:53:53 6 A. As far as sugar, Sweetener Supply Company.

16:54:02 7 Q. Anyone else?

16:54:30 8 A. The last one I can think of, Indiana Sugars.

16:54:35 9 Q. When Post is buying from these suppliers, does it
16:54:38 10 typically buy pursuant to a contract?

16:54:41 11 A. Yes. We will make contracts with companies for a
16:54:45 12 specific volume at a specific price.

16:54:51 13 Q. And when suppliers are making quotes to you, can they
16:54:54 14 bid on business for, you know, multiple plants in different
16:55:04 15 parts of the country?

16:55:05 16 A. Yes, they can.

16:55:06 17 Q. And how often does that happen?

16:55:09 18 A. I'd say all the time.

16:55:12 19 Q. And is that something you encourage on your end as
16:55:17 20 well?

16:55:18 21 A. Yes, it is.

16:55:21 22 Q. Why?

16:55:24 23 A. I'm always trying to obtain the best price for my
16:55:28 24 company regardless of what entity it is I'm going to be
16:55:32 25 buying from.

16:55:35 1 Q. How many suppliers do you typically give business to
16:55:43 2 at a given plant?

16:55:46 3 A. I've had as many as four different vendors into a
16:55:51 4 plant. I've had two vendors to a plant. I've also had, in
16:55:58 5 some cases, one vendor into a plant. So it can vary.

16:56:05 6 Q. And what do you see as some potential benefits, if
16:56:11 7 there are any, of being single-sourced at a given plant?

16:56:20 8 A. An advantage of being single-sourced might be I might
16:56:27 9 be able to generate a lower price by having -- by having a
16:56:33 10 vendor be the sole supplier in there. They might have a
16:56:39 11 motive to give me a lower price if they have all of the
16:56:44 12 volume.

16:56:51 13 Q. Do you consider criteria other than price in awarding
16:56:56 14 any of the businesses at Post plants?

16:56:58 15 A. Yes. The price, while obviously very important, I
16:57:02 16 also have to have service and quality. And what I mean by
16:57:10 17 that is: When we place orders, I have to be able to, you
16:57:14 18 know, have that sugar delivered on time and in the right
16:57:18 19 amount.

16:57:18 20 Q. And so, you know, when we were talking about service,
16:57:22 21 is that kind of going to kind of a continuity of supply
16:57:28 22 issue for you?

16:57:28 23 A. It's continuity of supply and it's on-time deliveries
16:57:34 24 based upon our needs for that material to arrive so the
16:57:39 25 plant can, you know, maintain its production schedule.

16:57:43 1 Q. Does the number of refinery plants or processing
16:57:46 2 plants that a supplier has affect their ability to minimize
16:57:51 3 some kind of run of the mill disruptions that, kind of, can
16:57:55 4 otherwise happen in delivering sugar?

16:57:58 5 A. My opinion would be yes.

16:58:03 6 Q. And why is that?

16:58:04 7 A. The example that I would provide is that when I buy
16:58:10 8 from United Sugars, they are the marketing arm for multiple
16:58:18 9 manufacturing sites of beet cooperatives and the US Sugar
16:58:24 10 corporation in Florida. And when I buy sugar from them,
16:58:31 11 they have the ability to source that sugar from multiple
16:58:40 12 locations in order to fill my shipments and keep me running.

16:58:41 13 Q. So have you found it to be the case that if, you
16:58:51 14 know, one plant goes down, you can still get your deliveries
16:58:57 15 when you're supposed to because it's just going to come from
16:59:02 16 a different plant in the system?

16:59:04 17 A. That has been my experience.

16:59:05 18 Q. And for you at Post, does that make suppliers that
16:59:09 19 have multiple plants within their system more attractive to
16:59:12 20 you when you're deciding where to award business?

16:59:21 21 A. It will certainly be something that I think about and
16:59:26 22 consider.

16:59:32 23 Q. Who are the suppliers that have shipped to Asheboro
16:59:37 24 in the last five years?

16:59:40 25 A. United Sugars, Louisiana Sugar Refining under the

16:59:45 1 name of Cargill, National Sugar Marketing, and Imperial
17:00:04 2 Sugar.

17:00:04 3 Q. Has Asheboro ever received any sugar from Indiana
17:00:10 4 Sugars as well?

17:00:15 5 A. No, they have not.

17:00:16 6 Q. So we talked a little bit about United Sugars. How
17:00:21 7 long have you or has Post been a customer of United?

17:00:24 8 A. Post has been buying sugar from United Sugars as long
17:00:28 9 as I've been the buyer of sugar, which has been for ten
17:00:31 10 years now.

17:00:31 11 Q. And does United Sugars send both beet and cane sugar
17:00:41 12 into Asheboro?

17:00:41 13 A. Yes, they do.

17:00:51 14 Q. At a high level, is United typically Asheboro largest
17:00:51 15 supplier?

17:01:01 16 A. There have been years where United has been the sole
17:01:01 17 supplier into Asheboro.

17:01:11 18 Q. That was actually my next question, so you answered
17:01:11 19 that one.

17:01:20 20 A. But there are also years where they have not supplied
17:01:21 21 sugar into Asheboro.

17:01:21 22 Q. What are some of the reasons why Post has given
17:01:31 23 business to United at Asheboro in the past?

17:01:31 24 A. Price.

17:01:40 25 Q. So does that mean that frequently United is the

17:01:43 1 lowest price being quoted for Asheboro?

17:01:47 2 A. When United is awarded the business into Asheboro,
17:01:51 3 they will have the lowest price offered to me.

17:01:57 4 Q. Does United sell to other Post plants other than
17:02:07 5 Asheboro?

17:02:07 6 A. Yes, they do.

17:02:09 7 Q. And which ones are those?

17:02:10 8 A. They have actually sold sugar into all of the other
17:02:15 9 Post facilities.

17:02:18 10 Q. And then when United sends beet sugar into Asheboro,
17:02:23 11 where is that coming from?

17:02:24 12 A. I don't know the exact facilities, but I would expect
17:02:29 13 it would come from one of their beet cooperative facilities
17:02:34 14 in the upper Midwest out of North Dakota and Minnesota.

17:02:40 15 Q. And so after United, you -- you also mentioned that
17:02:46 16 Asheboro buys from the supplier Cargill; is that right?

17:02:51 17 A. Yes.

17:02:54 18 Q. Are they a large supplier to Asheboro?

17:02:59 19 A. In the last five years there have been years where
17:03:04 20 they have been the sole supplier into Asheboro.

17:03:08 21 Q. And have there also been years in the last five years
17:03:13 22 where Cargill was the largest of multiple suppliers into
17:03:20 23 Asheboro?

17:03:25 24 A. Yes.

17:03:29 25 Q. And where -- and where is LSR's refinery located?

17:03:31 1 A. New Orleans.

17:03:32 2 Q. And so when Cargill is shipping sugar to Asheboro
17:03:38 3 from New Orleans, is that coming by rail?

17:03:49 4 A. Yes, it is.

17:03:52 5 Q. And I should have said this: When LSR ships to
17:03:58 6 Asheboro, it's entirely cane sugar; is that right?

17:04:04 7 A. Yes, it is.

17:04:06 8 Q. So have there been times in the last five-year
17:04:11 9 stretch where Cargill has beaten United on price to supply
17:04:15 10 Asheboro?

17:04:16 11 A. Yes.

17:04:16 12 Q. So does this also mean that there have been times in
17:04:20 13 the last five years where Cargill has beaten everyone on
17:04:27 14 price to supply into Asheboro?

17:04:30 15 A. Yes.

17:04:37 16 Q. Are you aware that LSR has announced plans to expand
17:04:43 17 capacity at its refinery in Louisiana?

17:04:48 18 A. I have heard that.

17:04:51 19 Q. Do you expect that -- in your experience, do you
17:04:55 20 expect that the LSR expansion will make Cargill more
17:05:00 21 competitive for Asheboro's business?

17:05:03 22 A. I would be speculating, but I think it could be a
17:05:07 23 positive for us.

17:05:10 24 Q. And why is that?

17:05:13 25 A. Because they would have more domestic sugar or access

17:05:22 1 to domestic sugar to market.

17:05:27 2 Q. And why is that a positive for you?

17:05:31 3 A. Because as a domestically sourced producer, they have
17:05:44 4 more flexibility in their pricing versus having to buy their
17:05:49 5 sugar on the -- what's called the futures market, the 16
17:05:57 6 market, where it's an imported price. So as having access
17:06:02 7 to domestically produced sugar, my expectation is they'd
17:06:09 8 have more price flexibility.

17:06:12 9 Q. Earlier today you mentioned that NSM has supplied to
17:06:18 10 Asheboro within the last five years; is that right?

17:06:21 11 A. Yes.

17:06:24 12 Q. And have those shipments been bulk?

17:06:28 13 A. Bulk -- bulk railcars and -- okay. And I'm sorry, I
17:06:35 14 just remembered this. They also do supply some of the
17:06:41 15 50-pound bags of EFG sugar into Asheboro.

17:06:49 16 Q. And do you know, when NSM is shipping into Asheboro,
17:06:54 17 is it shipping from Renville or Idaho or some combination?

17:07:12 18 A. My understanding is it's all coming from Renville.

17:07:15 19 Q. Is Imperial's refinery near Savannah the closest
17:07:19 20 refinery to Asheboro?

17:07:22 21 A. I don't know the exact mileage of Savannah to
17:07:27 22 Asheboro versus Clewiston, Florida, or Baltimore, Maryland.

17:07:32 23 Q. Is it one of the closest refineries to Asheboro?

17:07:41 24 A. Yes.

17:07:42 25 Q. And in your experience, does that mean that Imperial

17:07:46 1 is also the most -- the cheapest refinery for Post to buy
17:07:53 2 for Asheboro?

17:08:05 3 A. No, it does not.

17:08:06 4 Q. How would you describe the prices that Imperial has
17:08:09 5 quoted you for Asheboro in the past?

17:08:12 6 A. In the past, they have been competitive and had the
17:08:15 7 best price where I have been able to buy material from them,
17:08:20 8 and then there are the occasions where they are not
17:08:24 9 competitive and do not have the best price into Asheboro.

17:08:31 10 Q. And have there been more instances where they have
17:08:41 11 not had the best price into Asheboro than instances where
17:08:51 12 they have?

17:08:51 13 A. I would say that my recollection is that in that last
17:08:57 14 two or three years, they have not been competitive on their
17:09:01 15 pricing into Asheboro.

17:09:03 16 Q. And does that mean that in the last few years that
17:09:08 17 suppliers such as Cargill have been more price competitive
17:09:12 18 into Asheboro?

17:09:17 19 A. The other vendors have had better pricing than what
17:09:25 20 Imperial has offered to me.

17:09:32 21 Q. So would it be fair to say that Domino's sales into
17:09:36 22 Asheboro have been comparatively small in the last five
17:09:40 23 years?

17:09:41 24 A. Extremely small.

17:09:43 25 Q. And why is that?

17:09:44 1 A. They did not have the best price.

17:09:47 2 Q. How do you think that their prices compare? You said
17:09:52 3 they didn't have the best price. Was it close or was it not
17:09:56 4 even close?

17:09:56 5 A. It would depend on how you define close. You know,
17:10:01 6 in the sugar business, a penny a pound or two pennies a
17:10:13 7 pound makes a big difference. And I can't -- I can't
17:10:17 8 recollect just how far out or how much higher they would be
17:10:23 9 versus what the lowest price was that I ended up paying.

17:10:30 10 Q. If US Sugar had two cane refining plants in its
17:10:34 11 system, do you see that as a potential benefit from --
17:10:41 12 purely from a continuity-of-supply perspective?

17:10:50 13 A. Yes, I would.

17:10:53 14 Q. And I think, and part of the reasons that you
17:10:56 15 described, you said that the price will vary depending on
17:10:59 16 the designation. What did you mean by that?

17:11:00 17 A. It is that I buy the sugar on a delivered price to
17:11:05 18 the individual cereal plants. So each facility -- each of
17:11:10 19 our cereal plants is going to have a different delivered
17:11:13 20 price for their sugar.

17:11:16 21 Q. So would it be fair to say that the freight cost --
17:11:20 22 all else being equal, the freight cost from a supplier that
17:11:23 23 is closer to the facility will be lower than the freight
17:11:30 24 cost from a supplier that is farther from the facility?

17:11:32 25 A. Yes.

17:11:38 1 Q. What are some of the benefits of having multiple
17:11:43 2 suppliers to a facility?

17:11:44 3 A. The benefits would include continuity of supply,
17:11:51 4 price competition in that if I were to continue to solicit
17:11:58 5 prices from companies and never buy anything from them, they
17:12:05 6 might decide to not want to supply me with, say, competitive
17:12:10 7 prices. So I like to keep vendors interested in doing
17:12:23 8 business with us, and that is one mechanism by which we can
17:12:29 9 do that.

17:12:31 10 Q. Sitting here today, do you have an understanding of
17:12:35 11 how much -- in terms of percentage, how much of the sugar at
17:12:40 12 Asheboro was provided by Imperial?

17:12:41 13 A. I can't put a number on it. All I can say is that
17:12:48 14 it's -- you said outside of the force majeure year, it has
17:12:52 15 been very small.

17:12:54 16 Q. Why do you -- I think you said that Imperial is one
17:12:59 17 of the suppliers for Asheboro. Why are they one of the
17:13:02 18 suppliers?

17:13:04 19 A. Well, at certain times in the force majeure year, for
17:13:09 20 example, they might have been the only vendor that would
17:13:13 21 sell me sugar into there, and they had it available. In
17:13:18 22 other cases, it might be because I have needed to buy some
17:13:23 23 spot sugar because of continuity of supply issues. But
17:13:28 24 perhaps going back further, they might have had the most
17:13:32 25 attractive price.

17:13:40 1 So I would say for any or some of those reasons,
17:13:44 2 they have supplied Asheboro.

17:13:50 3 Q. So let's talk about take the force majeure year. In
17:13:54 4 that year it seems like -- sounds like you reached out to
17:13:58 5 Imperial and purchased from Imperial; is that right?

17:14:00 6 A. Yes.

17:14:00 7 Q. And in that year -- when we say the force majeure
17:14:05 8 year, we mean the year in which United invoked a force
17:14:09 9 majeure because of disruptions in supply. Are we talking
17:14:15 10 about the same thing?

17:14:16 11 A. Yes.

17:14:19 12 Q. In that year were you glad that Imperial was able to
17:14:23 13 provide -- to satisfy Post's sugar needs on a quick
17:14:29 14 short-term basis?

17:14:33 15 A. I would say I was happy that I was able to buy sugar
17:14:39 16 to keep my facility operating.

17:14:42 17 Q. Do you view Imperial as an important supplier of
17:14:47 18 sugar to Post?

17:14:51 19 A. Imperial Sugar supplies very little sugar to the Post
17:14:56 20 Company.

17:14:59 21 Q. Right. But that's not really my question. My
17:15:04 22 question is do you view them as an important supplier in the
17:15:09 23 market for Post?

17:15:09 24 A. I would have to say is that Imperial Sugar, their
17:15:14 25 facility is important, but as far as being a supplier to

17:15:14 1 Post, based on our volume, I think the answer would have to
17:15:20 2 be no.

17:15:24 3 Q. And why have you chosen not to purchase from Michigan
17:15:28 4 Sugar for the Asheboro facility?

17:15:32 5 A. Their prices were not competitive.

17:15:37 6 (End of videotape deposition.)

17:15:43 7 MS. DWYER: Your Honor, we don't have any
17:15:45 8 exhibits for Thomas Crown.

17:15:47 9 We would like to call Paul Farmer from CSC by
17:15:52 10 deposition.

17:15:53 11 THE COURT: Mr. Hanna, you didn't have any
17:15:57 12 exhibits?

17:15:57 13 MR. HANNA: No, Your Honor.

17:15:57 14 (Videotape deposition of Paul Farmer:)

17:16:01 15 Q. Mr. Farmer, can you state your position and the
17:16:03 16 company you work for?

17:16:04 17 A. President and CEO of CSC Sugar.

17:16:07 18 Q. How long have you been president and CEO of CSC
17:16:11 19 Sugar?

17:16:11 20 A. Since I started in 2004.

17:16:15 21 Q. And what is CSC Sugar's business?

17:16:18 22 A. Our core business is supplying raw sugar to refining
17:16:23 23 companies in the United States. And our more recent but
17:16:25 24 minority business is refining of raw sugar into liquid sugar
17:16:32 25 products.

17:16:32 1 Q. So what did you say the core business was?

17:16:40 2 A. Supplying raw sugar to the refineries -- cane sugar
17:16:44 3 refineries in the United States.

17:16:45 4 Q. And then the other business you said was what?

17:16:56 5 A. We are a refiner of raw sugar, but we -- our only
17:17:00 6 product is liquid sugar.

17:17:07 7 Q. And what is the way that CSC makes liquid sugar?

17:17:12 8 A. Predominantly we start with a raw sugar product and
17:17:17 9 go through a -- many refining steps to end up with a
17:17:21 10 finished liquid sugar refined product, but not granulated.

17:17:24 11 Q. So is there a name for CSC's process for making
17:17:31 12 liquid sugar?

17:17:34 13 A. There is no name for the process. However we call
17:17:37 14 our liquid sugar division Sugaright.

17:17:42 15 Q. What is Sugaright's business?

17:17:45 16 A. Refining raw sugar into a refined liquid product.

17:17:50 17 Q. Do you ever ship liquid sugar from El Paso to
17:17:54 18 California?

17:17:55 19 A. We have in the past. I don't believe we currently
17:17:58 20 do.

17:17:59 21 Q. Where do you normally -- what's the distance you
17:18:03 22 normally ship liquid sugar from El Paso?

17:18:06 23 A. We ship as close as two miles away to as far as Cedar
17:18:11 24 City, Utah, which I would guess is five or 600 miles away.
17:18:16 25 I don't know offhand. And I believe we also ship to Denver,

17:18:20 1 which is 900 miles away.

17:18:22 2 Q. Do you ever -- do you ever ship liquid sugar by rail?

17:18:27 3 A. Yes. Not currently.

17:18:30 4 Q. When did you -- when was the period in which you
17:18:33 5 shipped liquid sugar by rail?

17:18:36 6 A. I don't recall the exact years, but it was
17:18:41 7 approximately three to four years. Somewhere probably 2012,
17:18:46 8 more or less, to 2015, or '16. And that shipment was
17:18:51 9 generally from El Paso, Texas to Los Angeles. It's
17:18:54 10 generally --

17:19:03 11 Q. And --

17:19:04 12 A. It's generally not done in the industry.

17:19:07 13 Q. Why is it generally not done in the industry?

17:19:10 14 A. Because the transit times on the railcars are
17:19:14 15 unreliable and, therefore, you know, you don't know how long
17:19:18 16 your finished product's going to be sitting in your railcar
17:19:23 17 potentially, you know, overheating or cooling off too much
17:19:26 18 or just degrading over time. Railroads are not that
17:19:31 19 reliable when it comes to just in time.

17:19:34 20 Q. Are there advantages to shipping liquid sugar by
17:19:38 21 tanker?

17:19:39 22 A. Yeah, delivery by truck. You can deliver it to very
17:19:43 23 precise times, time slots. Rail -- in railcars, the -- for
17:19:47 24 longer, you know, yeah. For longer distances, railcars
17:20:00 25 theoretically make sense, but the issue around the

17:20:04 1 reliability of the time -- of the schedule of the arrival is
17:20:09 2 the issue, which makes it more difficult.

17:20:11 3 Q. Is it a -- is it a problem if liquid sugar sits too
17:20:17 4 long in a railcar?

17:20:18 5 A. Yes.

17:20:18 6 Q. And why is that a problem?

17:20:22 7 A. Regular liquid sucrose generally has a shelf life of
17:20:27 8 less than thirty days under perfect conditions. And a rail
17:20:32 9 -- a railcar in the desert is not a perfect condition, so...

17:20:37 10 Q. And the liquid tanker trucks, how far do they
17:20:41 11 normally travel from your plants to deliver liquid sugar?

17:20:48 12 A. I don't know the average miles that our company
17:20:51 13 ships. I can say that we have plants that are a thousand
17:20:55 14 feet away from certain customers and other ones we deliver
17:21:00 15 900 miles. On average, we say liquid sugar is uneconomical
17:21:07 16 to ship more than probably 250 miles.

17:21:10 17 Q. Are there some companies that prefer to purchase dry
17:21:13 18 sugar rather than liquid sugar?

17:21:15 19 A. Yes.

17:21:15 20 Q. And what sort of companies are those that prefer to
17:21:18 21 purchase dry sugar?

17:21:19 22 A. I don't think there is any specific type of company.
17:21:22 23 You know, it just comes down to the management's choice of
17:21:27 24 whichever company it is.

17:21:30 25 Q. Does CSC sell liquid sugar to any company that uses

17:21:37 1 it for a nonliquid product?

17:21:40 2 A. Yes.

17:21:41 3 Q. And what company is that?

17:21:42 4 A. There are many companies. We sell to [REDACTED]

17:21:50 5 [REDACTED] We sell to [REDACTED]

17:21:54 6 [REDACTED]

17:21:55 7 Q. And they use the liquid sugar in the nonliquid
17:22:00 8 product?

17:22:01 9 A. That's correct.

17:22:03 10 Q. And who are some of the [REDACTED] companies that
17:22:08 11 purchase liquid sugar from CSC?

17:22:11 12 A. We deliver to [REDACTED]. I don't
17:22:14 13 believe our sales to [REDACTED], though, go in [REDACTED].
17:22:29 14 It probably goes in [REDACTED]

17:22:33 15 [REDACTED]

17:22:34 16 Q. Do you know where your sales to [REDACTED] go? What
17:22:39 17 products the liquid sugar goes into?

17:22:44 18 A. [REDACTED]

17:22:45 19 Q. Why do you think the suspension agreement was
17:22:48 20 adopted?

17:22:48 21 A. Specifically to harm my company.

17:22:51 22 Q. And who do you think wanted to harm your company?

17:22:52 23 A. Everybody involved with the American Sugar Coalition,
17:22:57 24 which is virtually all sugar producers and refiners in the
17:23:02 25 United States other than CSC.

17:23:05 1 Q. And what is CSC's financial condition now?

17:23:09 2 A. Much better.

17:23:11 3 Q. What do you mean by "much better"?

17:23:15 4 A. Our company is stable, healthy.

17:23:16 5 Q. How was CSC able to improve its financial condition
17:23:20 6 from 2019 to 2022?

17:23:23 7 A. Business conditions have generally improved, both in
17:23:26 8 volume and refining margins.

17:23:33 9 Q. And have prices of liquid sugar generally gone up?

17:23:37 10 A. The price of sugar in the United States is up about
17:23:41 11 40 percent due to a poorly managed program by the U.S.
17:23:44 12 government, who is tightening up the supply and screwing the
17:23:47 13 consumers. So yes, the prices are up.

17:23:50 14 Q. Do you have concerns that the price of sugar might
17:23:53 15 even go higher?

17:23:56 16 A. The price is currently at the virtual maximum price
17:23:59 17 where anybody in the United States could bring sugar from
17:24:02 18 anywhere in the world and pay a tax of about 15 to \$0.16 a
17:24:05 19 pound and bring it in, and the total price delivered would
17:24:08 20 be more or less the same -- the price that U.S. growers --
17:24:11 21 grower/refiners are getting for their sugar today. So no,
17:24:14 22 it's not likely to go much higher unless the world market
17:24:17 23 price goes higher. It's already at the theoretical maximum
17:24:20 24 price.

17:24:23 25 Q. Do you have a view as to what the potential impact of

17:24:29 1 this transaction could be on sugar prices?

17:24:32 2 A. My view is that transaction is irrelevant in the
17:24:35 3 industry because the Imperial Sugar refinery was virtually
17:24:40 4 obsolete in 1998 when US Sugar built its refinery in
17:24:45 5 Florida. There is a surplus refining capacity in the
17:24:48 6 southeast. The transaction will have no effect on the
17:24:51 7 industry.

17:24:51 8 Q. Do you think it will impact prices at all? I'm
17:24:54 9 sorry, what was your answer?

17:24:55 10 A. No, I don't.

17:24:56 11 Q. And why do you think that?

17:24:58 12 A. Because in the -- in the southeast area, there is
17:25:01 13 already stiff competition from three large US players, US
17:25:04 14 Sugar coming from Florida, Domino or American Sugar Refining
17:25:11 15 Company coming south from Baltimore and east from New
17:25:15 16 Orleans; as well as LSR which is targeting Louisiana growers
17:25:21 17 coming east from New Orleans, so there is already
17:25:24 18 significant competition in that area. And the price is
17:25:26 19 already at the maximum. Can't get any higher. The
17:25:28 20 government's already screwed the consumer.

17:25:32 21 Q. Okay. So the total cost of building a micro-refinery
17:25:34 22 would be five to 20 million plus whatever the land and
17:25:40 23 building cost?

17:25:42 24 A. That's correct.

17:25:44 25 Q. This is on CSC Sugar's letterhead and the date is

17:25:56 1 August 1, 2018. And it's letter to the Honorable Wilbur L.
17:26:01 2 Ross, Jr., Secretary of Commerce. Do you see this,
17:26:04 3 Mr. Farmer?

17:26:05 4 A. I do.

17:26:05 5 Q. And do you recognize this document?

17:26:07 6 A. I do. I wrote it.

17:26:10 7 Q. And on the fifth page, do you seen a company
17:26:15 8 certification?

17:26:15 9 A. I do.

17:26:17 10 Q. And is that your signature on page 5?

17:26:21 11 A. Yes.

17:26:23 12 Q. And in the company certification, do you see that you
17:26:27 13 certify that the public information and any business
17:26:30 14 proprietary information of CSC Sugar LLC contained in this
17:26:35 15 submission are accurate and complete to the best of my
17:26:38 16 knowledge?

17:26:38 17 A. Yes.

17:26:40 18 Q. And if you can turn to the next page, the paragraph
17:26:44 19 beginning, "The U.S. cane refining industry is already very
17:26:48 20 concentrated with only a few players."

17:26:50 21 A. Yes.

17:26:51 22 Q. And what did you mean by that sentence, "The U.S.
17:26:54 23 cane refining industry is already very concentrated with
17:26:58 24 only a few players."

17:26:59 25 A. Exactly what it says which is that there are -- there

17:27:07 1 are -- there are a few refining companies, and one of them
17:27:11 2 is more than 50 -- I think at the time was about 56 percent
17:27:14 3 of the entire cane refining capacity belonged to ASR. The
17:27:18 4 only stand-alone cane refiners that weren't vertically
17:27:23 5 integrated with growers in the United States were Imperial
17:27:27 6 Sugar and CSC Sugar at the time.

17:27:30 7 Q. And the last sentence in that paragraph says "the
17:27:33 8 industry needs diversified capacity, not monopoly."

17:27:37 9 What did you mean by that statement?

17:27:38 10 A. Exactly what it says, word for word.

17:27:40 11 Q. What does diversified capacity mean in that sentence?

17:27:44 12 A. Capacity not owned by one of the current large
17:27:48 13 players.

17:27:50 14 Q. And what were you asking Secretary Ross to do?

17:28:00 15 A. I was asking him to kill the amendment to the
17:28:04 16 suspension agreement that was specifically targeted to
17:28:10 17 disrupt the supply chain of good quality sugar to my
17:28:14 18 company.

17:28:21 19 Q. And what did Secretary Ross do?

17:28:24 20 A. Nothing. He basically bowed down to the sugar
17:28:28 21 interest in the United States, the American Sugar Coalition,
17:28:32 22 or cartel, whatever you want to call it. And basically put
17:28:36 23 through the change in the suspension agreement and virtually
17:28:40 24 destroyed my company.

17:28:44 25 Q. And would you say that CSC Sugar is a minor

17:28:49 1 participant in the market for refined sugar?

17:28:53 2 A. CSC is a minor player in the overall refined sugar
17:28:58 3 market in the United States. We are probably less than five
17:29:01 4 percent. However, for liquid sugar in the market segments
17:29:06 5 that we're in, we are probably considered a larger player
17:29:10 6 but in a very specific narrow market.

17:29:13 7 Q. So whatever the definition of southeast is, we could
17:29:16 8 get the percentage of CSC's business by looking at that
17:29:20 9 data?

17:29:20 10 A. Yes.

17:29:20 11 Q. Okay. And --

17:29:23 12 A. I would like to say that, to my knowledge, we have
17:29:25 13 not and currently do not ever see or compete with US Sugar
17:29:32 14 or Imperial with any of our customers that I'm aware of. So
17:29:36 15 you know, although we may -- you may look at us in the same
17:29:40 16 territory, to my knowledge I've never heard that we are
17:29:44 17 competing against them for anything, either one.

17:29:47 18 Q. And are CSC's sales in the south generally limited to
17:29:54 19 the sale of liquid sugar?

17:29:56 20 A. Yes.

17:30:02 21 Q. And is the sales generally limited to liquid sugar
17:30:06 22 manufactured -- plants located in close proximity to
17:30:12 23 customers?

17:30:12 24 A. Yes. Yes.

17:30:12 25 Q. And you said that when making those sales you don't

17:30:16 1 see United or Imperial as competitors?

17:30:19 2 A. We -- well, so most of those sales are to customers
17:30:24 3 that take only cane sugar and not beet. And therefore,
17:30:29 4 United or -- well, we generally don't see sugar from US
17:30:35 5 Sugar in Florida or from Imperial competing. Once again, we
17:30:41 6 may -- yeah. When we offer sugar, we are not told by the
17:30:48 7 buyer who the -- who the competitors are, but to my
17:30:54 8 knowledge, we have not lost a business or competed against
17:30:58 9 Imperial or US Sugar, but I may not have all of the
17:31:04 10 information on that. But to my knowledge, we haven't run
17:31:11 11 across anybody at US Sugar. I don't even know anybody at US
17:31:21 12 Sugar.

17:31:21 13 Q. Mr. Farmer, would you pull up what's been marked as
17:31:26 14 Exhibit 6 to your deposition. It's the confidential
17:31:28 15 information memorandum.

17:31:29 16 A. Yep.

17:31:31 17 Q. Okay. If you go to the second page of Exhibit 6,
17:31:34 18 sir. Do you see there is a notice and the first sentence
17:31:37 19 says, "This confidential information memorandum (this
17:31:40 20 memorandum) has been approved by CSC Sugar LLC."

17:31:42 21 Do you see that?

17:31:43 22 A. Yes.

17:31:45 23 Q. Was that a true statement?

17:31:47 24 A. Yes.

17:31:48 25 Q. Mr. Farmer, when did CSC build its first liquid sugar

17:31:53 1 refinery?

17:31:54 2 A. 2006.

17:31:56 3 Q. And where was that one located, sir?

17:31:58 4 A. El Paso, Texas.

17:32:01 5 Q. And --

17:32:02 6 A. But at the same time we built another one in Joplin,
17:32:07 7 Missouri.

17:32:07 8 Q. And since then, you have built additional refineries
17:32:11 9 in Tennessee, correct?

17:32:13 10 A. Correct.

17:32:13 11 Q. And you've built an additional refinery in Virginia,
17:32:18 12 correct?

17:32:18 13 A. Correct.

17:32:18 14 Q. You've built an additional refinery in Illinois,
17:32:22 15 correct?

17:32:22 16 A. Correct. It was later shut down, but that's correct.

17:32:25 17 Q. And you built a refinery in Pennsylvania in Fairless
17:32:31 18 Hills, correct?

17:32:31 19 A. Correct.

17:32:31 20 Q. And Fairless Hills, that's about fifty miles from
17:32:35 21 Wilmington, Delaware?

17:32:35 22 A. That's correct.

17:32:35 23 Q. And then you moved your facility from Fort Worth to
17:32:41 24 Dallas, Texas, is that correct?

17:32:42 25 A. Correct.

17:32:44 1 Q. The Dallas facility, sir, when did you start
17:32:48 2 construction on that?

17:32:49 3 A. I would say -- June or -- I think June or July of
17:33:01 4 2021.

17:33:02 5 Q. Okay. So you started construction in June or July of
17:33:05 6 2021, and when was it done?

17:33:07 7 A. I believe the first load was shipped in the last few
17:33:11 8 days of 2021.

17:33:13 9 Q. Okay.

17:33:14 10 A. Probably the last week of 2021.

17:33:16 11 Q. So the construction period there was about six
17:33:19 12 months. Is that -- is that about right?

17:33:21 13 A. That's correct.

17:33:21 14 Q. Okay. And what was the -- what was the cost of
17:33:24 15 building the Dallas, Texas, facility?

17:33:28 16 A. I don't recall the exact number, but it's probably
17:33:31 17 four to \$5 million.

17:33:31 18 Q. Is it fair to say that CSC has been able to refine
17:33:41 19 its model and has a model that it can replicate now?

17:33:42 20 A. Yes.

17:33:42 21 Q. And so the Dallas facility that was recently built,
17:33:51 22 it follows the model that you employed in Virginia and
17:33:52 23 Tennessee; is that right?

17:33:52 24 A. Correct.

17:33:52 25 Q. Okay. And that facility, again, took six months to

17:34:00 1 build, correct?

17:34:01 2 A. Correct.

17:34:02 3 Q. Okay. All right. Does CSC consider itself to be an
17:34:07 4 innovator in the field of sugar refining and production?

17:34:10 5 A. Yes.

17:34:10 6 Q. In what ways do you believe CSC is innovative?

17:34:15 7 A. Initially, it was determining that the product that
17:34:19 8 my competitors sold was the wrong finished product for the
17:34:24 9 -- for the needs of the customers. And it was designing an
17:34:30 10 alternative finished product, specifically a higher color
17:34:31 11 liquid sugar. And then on top of that, basically, you know,
17:34:37 12 proprietary design of the -- of the flow within the
17:34:41 13 refinery, and the -- and the concept of the micro-refineries
17:34:46 14 close to the customer, which significantly reduces
17:34:50 15 transportation issues and increases reliability.

17:34:55 16 Q. And, you know, Sugaright 350 in other words, 350
17:35:00 17 RBUs has become the industry standard for almost all dairy
17:35:07 18 products, correct?

17:35:08 19 A. Correct.

17:35:09 20 Q. Examples of CSC customers, I think you talked about a
17:35:12 21 company called [REDACTED] earlier today, correct?

17:35:13 22 A. Correct.

17:35:13 23 Q. And what is the business of [REDACTED] as you understand
17:35:17 24 it?

17:35:18 25 A. It's one of [REDACTED]

17:35:21 1

17:35:25 2

17:35:29 3

17:35:34 4

17:35:38 5

17:35:41 6

17:35:44 7

17:35:44 8 Q. And they're a large CSC customer, is that right?

17:35:47 9 A. Yes, I believe our largest.

17:35:49 10 Q. In fact, you displaced ASR there in [REDACTED],

17:35:53 11 correct?

17:35:53 12 A. Correct.

17:35:53 13 Q. You took the AS -- ASR had been selling to [REDACTED] in

17:35:59 14 [REDACTED], correct?

17:35:59 15 A. Yes.

17:36:00 16 Q. And then you began shipping products to [REDACTED] in

17:36:04 17 [REDACTED], correct?

17:36:05 18 A. Correct.

17:36:06 19 Q. And that came from the CSC plants in [REDACTED] and

17:36:11 20 [REDACTED] and [REDACTED], correct?

17:36:13 21 A. That's correct. That was when ASR had their metal
17:36:17 22 issue in 2017.

17:36:18 23 Q. And so ASR had an issue and couldn't supply [REDACTED] in

17:36:24 24 [REDACTED] and CSC stepped up and did, right?

17:36:28 25 A. Correct.

17:36:28 1 Q. And CSC shipped them project -- shipped them refined
17:36:32 2 -- liquid refined sugar from [REDACTED], from [REDACTED], and
17:36:36 3 from [REDACTED], all the way to [REDACTED], correct?

17:36:39 4 A. That is correct.

17:36:40 5 Q. And then what happened was [REDACTED] became such a big
17:36:44 6 customer that CSC opened up what Mr. Sandrock called a
17:36:47 7 micro-refinery in [REDACTED], correct?

17:36:50 8 A. Correct.

17:36:51 9 Q. [REDACTED] is another large customer of CSC, isn't it?

17:36:55 10 A. They have been on and off. [REDACTED] used to own

17:37:01 11 [REDACTED]. [REDACTED]

17:37:03 12 [REDACTED]

17:37:07 13 [REDACTED] Today they're a smaller
17:37:11 14 but for us one of our most important customers.

17:37:14 15 Q. And what's the business of [REDACTED]?

17:37:16 16 A. [REDACTED]

17:37:21 17 [REDACTED]

17:37:26 18 [REDACTED]

17:37:27 19 [REDACTED]

17:37:31 20 [REDACTED]

17:37:35 21 [REDACTED] that's another CSC customer; correct?

17:37:38 22 A. A recent customer, yes.

17:37:39 23 Q. And when you say recent, what do you mean by that?

17:37:42 24 A. I think only in the last few years have we started
17:37:46 25 supplying [REDACTED]

17:37:47 1 Q. [REDACTED], is that another CSC customer?

17:37:51 2 A. It is.

17:37:51 3 Q. What is the business of [REDACTED]?

17:37:54 4 A. [REDACTED]

17:37:59 5 [REDACTED]

17:38:01 6 Q. [REDACTED] is another customer of CSC, correct?

17:38:04 7 A. Correct.

17:38:04 8 Q. Which part of [REDACTED] is CSC sugar used in?

17:38:11 9 A. [REDACTED]

17:38:15 10 [REDACTED]

17:38:25 11 [REDACTED]

17:38:29 12 [REDACTED]

17:38:34 13 [REDACTED]

17:38:37 14 [REDACTED]

17:38:41 15 [REDACTED]

17:38:45 16 [REDACTED]

17:38:48 17 [REDACTED] that's another customer of CSC?

17:38:51 18 A. It is.

17:38:51 19 Q. And what [REDACTED] products is CSC sugar going in?

17:38:52 20 A. I believe we deliver them only low colored sugar and
17:39:00 21 I believe it goes into all of their products.

17:39:02 22 Q. If we could take a look at Exhibit 1, sir. Let me
17:39:06 23 just make sure that I understand. Let's go to the pounds by
17:39:10 24 state by customer.

17:39:13 25 A. Yep.

17:39:14 1 Q. And do you see that column B, Row 7, there's a
17:39:22 2 heading "AL." I assume that's Alabama?

17:39:26 3 A. I believe that's correct.

17:39:28 4 Q. Okay. And then it appears to have the total sales by
17:39:32 5 dry pound by CSC into the state of Alabama by year; is that
17:39:36 6 correct?

17:39:36 7 A. That is correct.

17:39:43 8 Q. And so, for example, in 2020, CSC sold nearly [REDACTED]
17:39:48 9 [REDACTED] dry pounds of refined sugar into the state of
17:39:52 10 Alabama; correct?

17:39:54 11 A. That's correct.

17:40:03 12 Q. And if you go down to Row 188, does that show the
17:40:08 13 sales by CSC of liquid refined sugar to customers in the
17:40:13 14 state of Tennessee for the years 2016 to 2021?

17:40:18 15 A. Correct.

17:40:19 16 Q. And the sales by CSC to customers in the state of
17:40:21 17 Tennessee have [REDACTED] from 2016 to 2021; correct?

17:40:28 18 A. That's correct.

17:40:28 19 Q. Going from [REDACTED]
17:40:32 20 pounds?

17:40:32 21 A. That is correct.

17:40:32 22 Q. And Mr. Farmer, by 2020 -- by 2020, CSC was selling
17:40:42 23 nearly [REDACTED] dry pounds to customers throughout the
17:40:51 24 United States; correct?

17:40:52 25 A. Correct.

17:40:52 1 Q. And by 2021, that increased again to [REDACTED]

17:40:59 2 [REDACTED] dry pounds; correct?

17:41:01 3 A. Correct.

17:41:02 4 Q. Okay. So by 2021, it's [REDACTED] dry pounds up

17:41:08 5 from, I believe it's [REDACTED] dry pounds in 2011,

17:41:14 6 correct?

17:41:15 7 A. Correct.

17:41:15 8 Q. So a growth of well over [REDACTED] pounds from

17:41:20 9 2011 to 2021, correct?

17:41:22 10 A. Correct.

17:41:27 11 Q. And as reflected in slide 32 on Exhibit 6, in 2019, a

17:41:33 12 new CSC refinery came onboard in Harrisonburg, Virginia,

17:41:41 13 correct?

17:41:42 14 A. Correct.

17:41:42 15 Q. And that led to increased sales volume; correct?

17:41:47 16 A. That's correct.

17:41:51 17 Q. And slide 11 of Exhibit 6 talks about Sugaright's

17:41:55 18 competitive advantages, and it includes "facilities

17:42:00 19 strategically located on key logistic corridors and in

17:42:02 20 regions with concentrations of large customers." What's

17:42:02 21 meant by that, sir?

17:42:02 22 A. What's meant is that we strategically located our

17:42:12 23 plants along a logistics chain of multiple customers. And,

17:42:20 24 you know, the food industry in the United States over the

17:42:22 25 last one hundred years, based -- 100 years ago, all the food

17:42:28 1 factories were in the cities. And today, virtually all the
17:42:32 2 food factories are nowhere near the city. They're a few
17:42:36 3 hundred miles away inland where labor is better, the roads
17:42:40 4 are better and there is no congestion, we look for target
17:42:45 5 areas where there are multiple industrial users along with
17:42:50 6 economical logistics chain for both input and output of our
17:42:54 7 refinery.

17:42:55 8 Q. If I can get you to turn to slide 13 of Exhibit 6,
17:42:59 9 sir.

17:43:00 10 A. Yep, I have it up. I have it open.

17:43:04 11 Q. And then it lays out what CSC and Sugaright believe
17:43:10 12 the advantages of the Sugaright's refining process are,
17:43:14 13 correct?

17:43:14 14 A. That's correct.

17:43:15 15 Q. And we talked about those today, "reduced product
17:43:18 16 costs", "fewer processing steps", "less energy consumption
17:43:21 17 by 75 to 85 percent", "lower water consumption", and you say
17:43:24 18 "greater reliability from modern refineries and equipment",
17:43:28 19 is that correct? WITNESS: Yes. And are those the benefits
17:43:31 20 that CSC touts to potential customers of its Sugaright
17:43:34 21 refining process?

17:43:37 22 A. Yes.

17:43:39 23 Q. And are those the benefits that CSC touts to
17:43:42 24 potential customers of its Sugaright refining process?

17:43:45 25 A. Yes.

17:43:52 1 Q. And Sugaright has been successful in convincing
17:43:59 2 customers to adopt its Sugaright refining process over the
17:44:03 3 last ten years; correct?

17:44:04 4 A. Correct.

17:44:08 5 Q. So, for example, there no plans to expand into
17:44:12 6 Georgia?

17:44:12 7 A. That's correct, there is are no plans to expand in
17:44:15 8 the southeast.

17:44:16 9 Q. How long has it taken to plan and build CSC's other
17:44:21 10 facilities?

17:44:21 11 A. It generally takes about a year.

17:44:23 12 Q. And the cost of that, you said, was between five and
17:44:27 13 \$20 million, plus land and building costs?

17:44:31 14 A. Yeah, the base refinery is generally speaking more or
17:44:34 15 less 5 to \$7 million.

17:44:41 16 (End of videotape.)

17:44:47 17 MS. DWYER: Your Honor, defendants would like to
17:44:49 18 move into evidence DTX 314 which was Farmer Exhibit 6,
17:44:54 19 exhibit JTX 002, which was Farmer Exhibit 1.

17:44:58 20 MR. HANNA: No objection.

17:44:58 21 THE COURT: Thank you. They're admitted.

17:44:58 22 (JTX Exhibit No. 002 and DTX Exhibit No. 314
17:44:58 23 were admitted into evidence.)

17:45:02 24 THE COURT: All right. So the next one is
17:45:06 25 nineteen minutes?

17:45:07 1 MS. GREENWALD: Yes, Your Honor.

17:45:08 2 THE COURT: Yeah, I don't think I have the
17:45:10 3 stamina for that right now. Not that they're not
17:45:14 4 fascinating. Okay. So tell me what I can expect tomorrow.

17:45:20 5 MR. BUTERMAN: Yes, Your Honor. I just did the
17:45:23 6 calculations, it looks like we have a few more videos, and
17:45:28 7 then there is one live witness. We anticipate that we will
17:45:33 8 be resting I'm going to say sometime around 10:30 in the
17:45:38 9 morning give or take.

17:45:40 10 THE COURT: Who is the live witness?

17:45:41 11 MR. BUTERMAN: The live witness is Mr. Carter
17:45:44 12 from Cargill.

17:45:47 13 THE COURT: Okay. And are you still trying to
17:45:51 14 figure out your rebuttal?

17:45:53 15 MR. HANNA: Yes, Your Honor. I'm going to look
17:45:55 16 at the time. We were planning to reserve an hour for
17:45:58 17 closing, so I want to take -- I will let you know in the
17:46:03 18 morning.

17:46:03 19 THE COURT: All right. Anything else?

17:46:07 20 MR. BUTERMAN: Nothing.

17:46:08 21 MR. HANNA: No, Your Honor.

17:46:09 22 THE COURT: Have a good night.

23 (Court adjourned at 5:46 p.m.)

24 I hereby certify the foregoing is a true and
25 accurate transcript from my stenographic notes in the proceeding.

/s/ Dale C. Hawkins